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Predictable Mediation Confidentiality in the U.S. Federal System

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I. INTRODUCTION

The importance of confidentiality is axiomatic in mediation.[1] Or, perhaps more accurately, the *perception* of confidentiality is of central importance. The benefits of confidentiality flow from each party's expectation, during a mediation, that neither the mediator nor the other party will be able to disclose later what transpires. But because mediation confidentiality is not (and should not be) absolute, the strength of this expectation depends on the ability to predict, at least roughly, the limits on disclosure in a future dispute. In the current legal environment, such prediction is not realistic because so many uncontrollable factors determine which of many widely varying legal frameworks a court will use to determine disclosure. Predictability is a particular problem in subsequent litigation in federal court, the focus of this article, because the federal doctrine governing choice of law for confidentiality is peculiarly complex. In fact, uncertainty as to applicable law extends even to confidentiality for mediations conducted under the auspices of the federal courts themselves.[2]

The need for consensus on appropriate disclosures, and the consistency it would bring to confidentiality, is now a pressing concern because of the extent to which mediation has come of age. Its use has increased dramatically both in breadth and frequency. Mediation has become an integral part of resolving disputes involving every imaginable subject in a wide range of

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[1] *See infra* text accompanying notes 10–23.

[2] A significant number of federal district courts established ADR programs as part of the expense and delay plans they developed under the Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471–482 (1994). By 1996, over half the districts offered mediation, prompting the conclusion that "[m]ediation has emerged as the primary ADR process in the federal district courts." ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 4 (1996). Congress encouraged further growth in federal court mediation programs with the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652 (Supp. V 1999). The Act requires every district court to establish an ADR program by local rule. District courts must require litigants to consider using ADR in every case and they are authorized to require them to use mediation. *Id.* § 652(a). The federal Courts of Appeals also have active mediation programs in each circuit. *See, e.g.*, Robert W. Rack, *Pre-argument Conferences in the Sixth Circuit Court of Appeals,* 15 U. TOL. L. REV. 921 (1984) (examining the Sixth Circuit's Pre-Argument Conference Program).

settings: by private agreement, in collective bargaining, within the commercial sector, through community centers, and as part of the dispute resolution services provided by state and federal courts.[3] In the public sphere, the federal government encourages mediation within its agencies and by its own lawyers.[4] The states have passed hundreds of statutes establishing specific mediation programs,[5] and many have now created state offices dedicated to fostering greater reliance on mediation.[6]

Unfortunately, this healthy growth in mediation has been accompanied, perhaps inevitably, by a rise in disputes that touch on mediation. This subsequent litigation may concern a multitude of topics, including the underlying dispute in an unsuccessful mediation, disagreements over the existence or validity of a settlement agreement reached in mediation, and claims of attorney or mediator misconduct. There are really no limits on the type of proceeding in which mediation discussions may be relevant. In many of these post-mediation disputes a party seeks to rely on statements made, or events that occurred, during mediation and therefore attempts to pierce the confidentiality of the mediation in discovery, at trial, or in an administrative proceeding. If these attempts become routinely successful, they will threaten the important goals fostered by the promise of confidentiality in mediation.

Currently, it is not an overstatement to say that no mediator or counsel in the country can, with confidence, predict the extent to which it will be possible to maintain the confidentiality of a mediation. At one time mediators routinely promised comprehensive confidentiality to participants,[7] but many

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[3] *See generally Developments in the Law—The Paths of Civil Litigation,* 113 HARV. L. REV. 1851, 1855–57 (2000).

[4] *See* Administrative Dispute Resolution Act of 1990, 5 U.S.C. §§ 571–584 (Supp. 2000) (authorizing federal agencies to use ADR techniques); Exec. Order No. 12,778, 56 Fed. Reg. 55,195 (Oct. 25, 1991) (directing federal litigation counsel to suggest ADR to private parties and to use ADR in resolving claims against the United States). The Federal Alternative Dispute Resolution Council recently published guidance on confidentiality in agency ADR programs. Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000).

[5] *See* 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY, PRACTICE, at App. C-1-1 app. C (2d ed. 1994 & Supp. 2001).

[6] *See, e.g.*, ARK. CODE ANN. §§ 16-7-101 to 16-7-102 (Michie 1999); NEB. REV. STAT. ANN. § 25-2905 (Michie 1995); OHIO REV. CODE ANN. §§ 179.01–179.04 (Anderson 1999 & Supp. 2000); OR. REV. STAT. § 36.105 (1999).

[7] *See, e.g.*, Kevin Gibson, *Confidentiality in Mediation: A Moral Reassessment,* 1992 J. DISP. RESOL. 25, 28 (1992). *See also* ROBERT J. NIEMIC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 93–94 (2001) ("participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential"); Lawrence R. Freedman & Michael L. Prigoff, *Confidentiality in Mediation: The Need for Protection,* 2 OHIO ST. J. ON DISP. RESOL. 37, 42 (1986) (survey

mediators are more cautious now. Mediation confidentiality law differs greatly among jurisdictions in many dimensions. Discrepancies in confidentiality protection from state to state and court to court send confusing and contradictory messages on the extent to which parties can reasonably expect their statements in mediation to remain confidential. Predictability must be improved if confidentiality is to create its intended benefits for the mediation process. Furthermore, there is a special need for clarity in expectations when the parties are ordered to participate in mediation by a court or when a court-sponsored program makes representations about the confidentiality of its process. In this situation undermining expectations of confidentiality can also mean undermining trust in the courts.

Fortunately, much work toward clarifying party expectations for confidentiality in mediation has been done at the state level. In a historic cooperative venture, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association (ABA) have been working jointly to draft a Uniform Mediation Act.[8] One of the drafters' primary goals is to foster a consistent approach to confidentiality in mediation.[9] Thus, a mechanism is available for creating predictability for mediation disputes in the state court system.

This Article, therefore, emphasizes predictability for mediation confidentiality in federal court proceedings, which have not received the same amount of attention. In terms of the overall effect on mediation parties, the discrepancies among federal court rules and practices, the lack of vertical harmony between federal and state law, and the underdevelopment of federal mediation confidentiality law are as important as, and perhaps even more problematic than, horizontal state-to-state variations in confidentiality protections. Unfortunately, there is no single or simple solution, in part because of difficulties inherent in parallel court systems of overlapping jurisdiction and in part because of difficulties associated with protecting confidentiality.

Part II of this Article provides background on the importance of confidentiality in the mediation setting and outlines competing values that can justify disclosure of mediation communications in subsequent litigation proceedings. An interest analysis suggests that in many circumstances

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of mediation programs revealed that "most mediation is now done under the assumption that communications are privileged under the law, even if they really are not privileged").

[8] *See, e.g.*, Michael B. Getty et al., *Preface*, 13 OHIO ST. J. ON DISP. RESOL. 787 (1998) (Symposium on Drafting a Uniform/Model Mediation Act).

[9] UNIF. MEDIATION ACT, prefatory note (2001), *available at* http://www.pon.harvard.edu/guests/uma/.

multiple jurisdictions have interests in applying their law to confidentiality disputes, setting the stage for "true" conflicts of law that cannot easily be resolved.

Part III explores why the prospects for predictability are so poor when a dispute that can be decided in federal court implicates mediation confidentiality. First, it is not always easy to predict the court system and jurisdiction in which potential confidentiality issues will be tried, even when the mediation is conducted as part of a court-annexed program. Second, state-law protective mechanisms currently create uncertainty, because they differ greatly in their scope and coverage. Federal law mechanisms, in contrast, create uncertainty, because they are largely unarticulated. Third, vertical choice of law for confidentiality issues in federal court involves more than the usual complexities, because the mode of analysis itself depends on the source of protection. Courts select applicable law differently depending on whether mediation confidentiality is determined by a privilege, an evidentiary exclusion, testimonial incapacity, or settlement law.

Part IV examines possible means to increase predictability. There are a number of potential approaches, all of which offer only partial solutions. Parties can use mediation agreements to control confidentiality to a significant extent, and this practice could be expanded. More uniform federal court rules governing mediations could provide a coherent source for developing common law. The states have the power to greatly improve predictability in the overall court system by adopting the Uniform Mediation Act. The federal rule governing privileges could be revised to reduce uncertainty in choice of law. And a federal mediation privilege could create consistency and bypass the slow process of common-law development. Some combination of these initiatives will be necessary to improve the predictability of mediation confidentiality in the federal courts.

II. CONFIDENTIALITY IN THE CONTEXT OF MEDIATION

Confidentiality is a controversial subject in many contexts. But it is regarded as so crucial for mediation that the importance of confidentiality itself is rarely at issue in mediation scholarship. Rather, the major concern is with its effectiveness and limits on its reach.[10] Numerous commentators have

[10] The academic literature is replete with discussion of circumstances that justify disclosure of mediation communications in order to satisfy values that compete with confidentiality. *See, e.g.*, Gibson, *supra* note 7 (arguing that it is appropriate to breach confidentiality when necessary for accountability or to report threats, crime or abuse); Mori Irvine, *Serving Two Masters: The Moral Obligation Under the Rules of Professional Conduct To Report Attorney Misconduct in a Confidential Mediation*, 26 RUTGERS L.J. 155, 181–83 (1994) (advocating exception for mediator to report attorney

concluded that confidentiality is central to the mediation process,[11] and even most self-described dissenters agree with the principle that confidentiality needs to be protected to some extent, although they may disagree on the choice of protective legal mechanism.[12]

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misconduct); Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty To Maintain Mediation Confidentiality and the Duty To Report Fellow Attorney Misconduct,* 1997 BYU L. REV. 715, 753–54 (1997) (proposing exception to confidentiality statutes to allow mediators to report attorney misconduct); Alan Kirtley, *The Mediation Privilege's Transformation from Theory to Implementation: Designing a Mediation Privilege Standard To Protect Mediation Participants, the Process and the Public Interest,* 1995 J. DISP. RESOL. 1, 39–52 (surveying statutory confidentiality exceptions); Lynne H. Rambo, *Impeaching Lying Parties with Their Statements During Negotiation: Demysticizing the Public Policy Rationale Behind Evidence Rule 408 and the Mediation-Privilege Statutes,* 75 WASH. L. REV. 1037, 1093–96 (2000) (arguing for an exception allowing impeachment by prior inconsistent statements made in negotiation and mediation); Perrin Rynders, *Confidentiality in Mediation: A Conflict Between Two Value Systems,* 72 MICH. B.J. 1016, 1017 (1993) (pointing out that Michigan "Child Protection Law unambiguously requires at least some mediators to disclose confidences regarding child abuse"); Brian D. Shannon, *Confidentiality in Texas Mediations: Ruminations on Some Thorny Problems,* 32 TEX. TECH L. REV. 77, 79 (2000) (comparing exceptions to confidentiality in the draft Uniform Mediation Act to outcomes under Texas law); Dennis Sharp, *The Many Faces of Mediation Confidentiality,* DISP. RESOL. J., Nov. 1998, at 53, 56 (discussing state variations in confidentiality exceptions); Jeffrey C. Sun, *University Officials as Administrators & Mediators: The Dual Role Conflict & Confidentiality Problems,* 1999 BYU EDUC. & L.J. 19, 22 (1999) (discussing disclosure requirements that may trump university policies of mediation confidentiality); Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota,* 18 HAMLINE J. PUB. L. & POL'Y 329, 365–69 (1997) (recommending exceptions to mediation privilege).

[11] *See, e.g.*, Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?,* 85 MARQ. L. REV. 79, 79 (2001); Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution,* 16 PEPP. L. REV. S5, S28–29 (1989); Freedman & Prigoff; *supra* note 7, at 37–40; Philip J. Harter, *Neither Cop Nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality,* 41 ADMIN. L. REV. 315, 323–27 (1989); Kirtley, *supra* note 10, at 15–19; James L. Knoll, *Protecting Participants in the Mediation Process: The Role of Privilege and Immunity,* 34 TORT & INS. L. REV. 115, 115 (1998); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation,* 12 SETON HALL LEGIS. J. 1, 1–3 (1988); Kent L. Brown, Comment, *Confidentiality in Mediation: Status and Implications,* 1991 J. DISP. RESOL. 307, 309–11 (1991); Christopher H. Macturk, Note, *Confidentiality in Mediation: The Best Protection Has Exceptions,* 19 AM. J. TRIAL ADVOC. 411, 412 (1995); Timothy Hoxie, Note, *Protecting Confidentiality in Mediation,* 98 HARV. L. REV. 441, 444–45 (1984).

[12] *See, e.g.*, Charles W. Ehrhardt, *Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court,* 60 LA. L. REV. 91 (1999) (arguing that Federal Rule of Evidence (FRE) 408 provides adequate confidentiality

One of the reasons to use mediation is that a skilled neutral can enhance the quality and quantity of information brought to bear in a settlement attempt. This information, in turn, can improve the chances that the parties will reach an acceptable resolution to their dispute. In mediation, the parties may exchange information directly with each other or indirectly, with information relayed between them by the mediator. They may also reveal information solely to the mediator. A skilled mediator can often use this sensitive information to advance the negotiations even without conveying it to the adversary party. Confidentiality is a key element in encouraging this three-way communication process. Within the mediation process, mediators emphasize that they will not convey statements made in confidence in a caucus. But confidentiality must also extend outside the mediation process if it is fully to encourage parties to disclose information within mediation. Otherwise, many parties will be inhibited in their discussions by their concern that the mediator or adversary party will reveal, or be compelled to reveal, mediation statements.[13]

Encouraging forthright participation in the process is analogous to the rationale for privileges that protect confidentiality within important relationships such as those between attorney and client, priest and penitent, or doctor and patient.[14] Confidentiality is deemed essential in order to enable a quality of communication that would otherwise not take place.[15] In these familiar dyads, a privilege enhances candid communication by building on an existing foundation of trust that is inherent in a consultation with an advisor.

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protection for mediation); Eric D. Green, *A Heretical View of the Mediation Privilege,* 2 OHIO ST. J. ON DISP. RESOL. 1, 2, 32 (1986) (recognizing that confidentiality is "important, necessary, and appropriate" in "core cases" but arguing that a privilege is unnecessary to protect confidentiality); Note, *Making Sense of Rules of Privilege Under the Structural (Il)logic of the Federal Rules of Evidence,* 105 HARV. L. REV. 1339, 1355–57 (1992) (concluding mediation should be protected by FRE 408). *But see* Scott Hughes, *A Closer Look: The Case for a Mediation Privilege Has Not Been Made,* 5 DISP. RESOL. MAG. Winter 1998, at 14 (urging "it is important to remember that no empirical data exists that connects the success of mediation with the availability of a confidentiality privilege").

[13] Disclosures outside legal proceedings may be as much a concern as those in the context of a future lawsuit. Although some rules purport to prohibit "any" disclosure, this is a matter best left to the parties, who have more direct control over this form of confidentiality breach through agreement than they do over potential disclosure in litigation.

[14] *See generally* MCCORMICK ON EVIDENCE § 298, at 279–82 (John W. Strong ed., 5th ed. 1999).

[15] *Cf.* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating purpose of attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice").

Mediation, in contrast, involves adversary parties whose relationship is often characterized at the outset by a high level of distrust.[16] Hence, confidentiality takes on an even greater significance in encouraging effective communication in the mediation setting.

Confidentiality protection is especially important when the parties to a mediation are already in litigation or when litigation looms. Without such protection, parties will rationally anticipate that their statements in mediation will be turned against them by the opposing party if there are subsequent legal proceedings. As stated by the Second Circuit, this means that participants in meditation "of necessity will feel constrained to conduct themselves in a cautious, tightlipped, non-committal manner more suitable to poker players in a high-stakes game."[17] When the parties' relationship is defined by their adversarial posture in litigation, confidentiality is a tool that can modify this tightlipped conduct by allowing parties to step back from an adversarial form of engagement in order to better take advantage of the possibilities of mediation.

Confidentiality is also crucial to another cornerstone of mediation: the mediator's neutrality. It is this neutrality, along with faith in a mediator's skill, that permits the parties to trust the process enough to use it effectively.[18] Confidentiality protections contribute to this neutrality by limiting mediator testimony in post-mediation proceedings about the original dispute or about other disputes arising out of the mediation. A mediator has the most comprehensive view of a mediation, and her testimony may be viewed as more credible than that of any disputing party.[19] As a result, parties with a disagreement implicating a mediation usually attempt to call on the mediator to testify about what transpired during the mediation. In the courtroom, where one party wins and one loses, a mediator who testifies will often serve as a tiebreaker, and her disclosures will thus be seen as supporting one side to the detriment of the other.[20] Although the mediation in question might have ended, such disclosures raise the possibility that neutrals in future mediations may similarly be required to testify. Because the nature

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[16] *See, e.g.*, KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 160 (2d ed. 2000) (noting lack of trust as problem in dispute resolution).

[17] Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979).

[18] Neutrality has been described as "a primary value of mediation." Jacqueline M. Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 837 (1999).

[19] *See, e.g.*, Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1136–39 (N.D. Cal. 1999) (identifying interests advanced by compelling mediator to testify).

[20] *See, e.g.*, NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 55–56 (9th Cir. 1980) (per curium).

of good faith participation in mediation creates a likelihood that a mediator will gain knowledge that would be useful to one's adversary, if mediator testimony became commonplace even the most circumspect neutral would be unable to overcome the risk that his future testimony would be harmful to one of the parties.[21]

Confidentiality also serves an institutional purpose by safeguarding the neutrality of adjudication in a court that may hear a dispute arising out of a mediation. Evidentiary rules and court confidentiality policies for mediation communications deter parties from trying to use these communications to their advantage and protect the court from the perception of bias that could accompany that use. This rationale for maintaining confidentiality is particularly important in the context of court-sponsored mediation. Here the institutional ties between the mediation and potential subsequent adjudication create a possibility that a judge may receive information ex parte from a mediator. Confidentiality rules governing the court's mediation program can reassure the parties that informal routes to the decisionmaker are as restricted as formal evidentiary channels. This precaution not only avoids a chill on parties' participation in mediation, but, just as importantly, it helps maintain the stature of the court.[22]

For confidentiality protections to satisfy these purposes, parties must be confident of them before they are needed. Communication needs encouragement and the parties need to trust the mediator's neutrality ex ante, during the mediation before disclosure issues actually arise. Thus, conditions conducive to mediation depend on the parties' ability to predict, or at least approximate, the extent to which mediation communications will remain confidential in subsequent litigation.[23]

Current law is a long way from permitting parties to anticipate, even roughly, the degree of confidentiality they can count on in mediation. An absolute prohibition on any disclosure about mediation could fulfill this need for predictability, but confidentiality is not an unyielding principle. It competes with the fundamental litigation norm (itself stated in absolute terms) that a court is entitled, to borrow from the words of Wigmore, to

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[21] *See, e.g.*, Marchal v. Craig, 681 N.E.2d 1160, 1163 (Ind. Ct. App. 1997) (stating that court rule preventing mediator testimony protects the mediation process itself).

[22] *See, e.g.*, NIEMIC ET AL., *supra* note 7, at 112–13.

[23] *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

"every [person]'s evidence."[24] Mediation confidentiality also competes with more specific values that can be advanced by knowledge of communications made in mediation.[25] Disclosures may be justified, for example, by policies that further making accurate decisions in criminal cases, preventing child abuse or neglect, responding to allegations of attorney or mediator misconduct, or ensuring that a settlement agreement is not enforced if it was procured by fraud or duress.

Few, if any, jurisdictions have reached the same policy balance between each of these reasons to permit disclosure and the benefits of maintaining mediation confidentiality. Existing confidentiality safeguards vary dramatically in both their legal format and their scope, reflecting experimentation with different approaches as the field of mediation has developed.[26] This creates potential conflicts when more than one jurisdiction's law is relevant to the balance between confidentiality and disclosure. Depending on the circumstances, potential sources of applicable law for mediation confidentiality may include the forum where the underlying cause of action is (or was) pending, the host of the mediation, the forum for the subsequent confidentiality dispute, or the source of the underlying cause of action at issue in the mediation or in the subsequent dispute. One jurisdiction may perform all these functions, but they may also be spread among jurisdictions,[27] making both federal law and state law (including perhaps the law of multiple states) relevant to the confidentiality decision.

When a confidentiality dispute implicates the policies of multiple jurisdictions, the number of potential sources of applicable law can sometimes be reduced by asking which jurisdictions are "likely to experience the social consequences of implementing or frustrating those policies"[28] and removing the unaffected jurisdictions from contention on the theory that they have no "interest" in applying their policies.[29] A settlement eliminates some

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[24] 8 JOHN HENRY WIGMORE, EVIDENCE § 2192, at 70 (John T. McMaughton rev. 1961); *see also* Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting United States v. Bryan, 339 U.S. 323, 331 (1950)).

[25] *See, e.g.*, Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1802–03 (1994) (stating a privilege represents a substantive interest that prevails over the interest in admitting all relevant evidence, but that gives way to other substantive interests that justify exceptions to the privilege).

[26] *See infra* Part III.B.

[27] *See infra* Part III.A.

[28] RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 3.1, at 52 (4th ed. 2001).

[29] *Id.* § 1.5, at 7–9.

important state or federal interests that would otherwise be relevant to a court's choice of privilege law. The goals of the substantive law at issue in a case are always implicated when the law provides a privilege. A privilege can prevent information that might be probative from coming to light, making a court's decision less accurate and less effective in effectuating those goals.[30] When parties reach a settlement, however, they substitute their own consensual resolution for the norms that would have been enforced through the law that governs the cause of action. Unless their settlement violates regulatory law, they are free to replace the outcome they would have obtained in court under state or federal norms with their agreed outcome.[31] This replacement removes the state or federal interest in achieving those norms. The parties are, in fact, choosing their own law. In an interest analysis, this may simplify the choice-of-law decision for mediation confidentiality to some degree. It means that there is no need to consider the interests associated with the original underlying cause of action when a mediation successfully led to a settlement of that action.

Even with this potential simplification through interest analysis, the hallmark of choice of law in mediation disputes is its complexity. When an underlying cause of action (filed in what I will call the initial forum) is at issue in a mediation, whether that forum is federal or state, one of its likely goals is to encourage successful settlements that will reduce the burden on its courts. More broadly, the forum's goals probably include a fair mediation procedure that provides parties with the means to tailor their own resolution for their dispute. Because protection for confidentiality contributes to the success of mediation, but at the same time may also have costs for other values, the forum's confidentiality rules represent a chosen balance between maintaining confidentiality and requiring disclosures.

If communications made during mediation in the initial forum are at issue in a proceeding in a subsequent forum, the subsequent forum's confidentiality decision will affect the ability of the initial forum to encourage mediated settlements. Yet the subsequent forum may well make this decision without reference to the initial forum's policy choices between encouraging settlement and other goals. In general, if the subsequent forum uses a mediation confidentiality rule that requires disclosure when the initial forum's rules promised confidentiality, parties may eventually put less faith in that promise and settlement rates may fall in the initial forum. Conversely, goals that compete with confidentiality in the initial forum, such as the importance of ensuring that parties are not held to agreements obtained by duress, can be threatened when a mediated agreement is at issue in a

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[30] *See, e.g.*, Dudley, *supra* note 25, at 1801–03.

[31] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

subsequent jurisdiction that does not permit disclosures in the relevant circumstances. When the mediation is sponsored by a court or other governmental entity, additional goals may also factor into the policy mix, such as the reputation and integrity of the sponsoring court. Because mediations are sponsored by federal courts, this interest is relevant to decisions between federal and state law as well as in a horizontal choice between state laws.

There are also mediations conducted without an underlying suit or in a jurisdiction other than the one in which an underlying suit was filed. The same issues that are important when a host jurisdiction serves as an initial forum—encouraging settlements and providing a fair balance with other goals in its law governing mediation—are important for its role as a host. Additionally, a host jurisdiction may seek to attract mediation activity. If so, it will have an interest in meeting the expectations of parties who choose to mediate in the jurisdiction. Like an initial forum, a host jurisdiction may bear the consequences of a subsequent court's action if it runs counter to the host's policy balance.[32]

The forum for a subsequent confidentiality dispute has an interest in using its own familiar rules to decide evidentiary issues raised by the dispute in an efficient manner. In addition, depending on the nature of that dispute, this forum may also have an interest in applying its policy balance on confidentiality and disclosure. If, for example, a mediation was conducted in a divorce proceeding and the subsequent dispute concerns child abuse, the effects of admitting or excluding statements made during the mediation about treatment of the children will have consequences within the jurisdiction of the subsequent proceeding.

When the subsequent dispute concerns the validity of a mediated settlement, additional policies become relevant. The mediation host and the forum(s) probably all have rules that set policies designed to ensure that those who mediate or litigate in their jurisdictions receive the benefit of the contract for which they bargained, but not of agreements reached through unacceptable means. Moreover, in settlement disputes, the relevant policies also extend to norms related to the underlying claim. The jurisdiction that is the source of the settled (or allegedly settled) cause of action may have standards for the conditions under which the right in question may be surrendered, which would give it an interest in seeing its law applied to judge the validity of the settlement. In a settlement of a federal Title VII claim, for

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[32] For example, statements made in a confidential gang mediation program in one jurisdiction but revealed during a criminal prosecution in another jurisdiction with less protective rules could undermine the host forum's chosen policy for combating gang violence.

example, there is an expressed federal interest in preventing the federal rights at issue from being surrendered in a contract obtained without knowing consent.[33] Similarly, the relevant state would have an interest in the conditions under which a party releases a state-created claim. Therefore the forum, the mediation host, and the jurisdiction whose cause of action was settled all have interests in the application of their own laws, and those laws may differ in the extent to which they subordinate the goal of mediation confidentiality to concerns for how parties surrender rights and reach agreements.

In mediation, the parties also have an interest in the policy balances that determine the confidentiality of their communications and the conditions for enforcing their settlements. They may enter an agreement to mediate that specifies their own confidentiality provisions, designates a choice of law, or selects a mediation provider whose rules either cover confidentiality or contain a standard choice of law. In such contractual relationships, courts often recognize party autonomy and apply the choice of law indicated by the parties, or in the absence of an indication, fall back on the law of the jurisdiction with the most significant relationship.[34] For many privileges, even if the parties' choice of law provides less protection for confidentiality than the forum's law, a court could regard their decision to accept less stringent confidentiality as a simple waiver and apply the parties' agreement.

If the parties' choice interferes with a public policy of the forum, however, a court may limit their autonomy to choose their own confidentiality policy. Thus, in a forum that protects the effectiveness of mediation by safeguarding mediator neutrality, a court would be justified in overriding the parties' choice of law if it would abrogate forum limitations on the mediator's testimony. Additionally, under generally applicable principles, parties cannot validly agree to limit the availability of evidence to third parties. This public policy means that while parties can control confidentiality among themselves through a private law agreement, they must rely on public law to maintain confidentiality with respect to nonparties. There is also an important role for public law in providing confidentiality for parties who might not foresee the need, or have the means, to enter a confidentiality agreement.

In sum, there are pragmatic reasons to prevent disclosure of mediation communications in subsequent litigation. The effectiveness of mediation is enhanced when parties, participants, and (especially) mediators maintain confidentiality. As discussed in more detail in the following sections, the extent to which jurisdictions have chosen to protect mediation confidentiality

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[33] *See infra* note 146 and accompanying text.

[34] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

varies greatly, as does the weight given this confidentiality in the face of competing policies that favor disclosure. This variety is challenging in itself; in addition, multiple choice-of-law rules exacerbate the parties' difficulty in predicting confidentiality for their mediation.

III. THE DIFFICULTY IN PREDICTING CONFIDENTIALITY PROTECTION

Parties face multiple uncertainties concerning potential post-mediation disputes that may affect the level of confidentiality protection their mediation communications ultimately receive. First, section A illustrates that it may be hard for mediation parties to predict which court will hear their confidentiality dispute, which is the starting point for predicting choice of law. Second, even if parties can predict they will be in federal court, or a particular state court, they still face uncertainty in anticipating the protections that will apply to their confidentiality dispute. There are two primary components to this uncertainty: variable law and multiple ways to determine choice of law. Section B sketches the great variation in the current law of mediation confidentiality that faces a party in federal courts. Section C explores the further challenges to predictability associated with an unusually complex vertical choice-of-law process in federal court. These challenges are created by a combination of myriad analyses and their varied application by the courts. They also extend to federal court mediation programs, where it can be unclear whether local court rules, undeveloped federal common law, or the vagaries of state law will govern confidentiality disputes.

A. *What Forum Will Determine Confidentiality?*

With a private mediation before suit is filed, parties have no pre-existing link to any particular court or court system. If the dispute is not successfully resolved and ends up in court, the parties may lodge the case in any court where it meets jurisdiction and venue requirements.[35] Parties who are citizens of the same state and whose disputes do not involve federal claims can predict that they will end up in state court, probably in their "home" state. But any dispute that could involve a federal cause of action creates the possibility of suit in either state or federal court. And any dispute that

[35] *See, e.g.*, Asten, Inc. v. Wangner Sys. Corp., No. C.A. 15617, 1999 WL 803965 (Del. Ch. Sept. 23, 1999) (Delaware court enforcing agreement reached in Florida mediation to settle patent litigation in South Carolina between two Delaware corporations with principal places of business in South Carolina). Parties to a private agreement to mediate may control this uncertainty to some extent by designating a choice of judicial forum in the event the mediation is unsuccessful.

involves parties of different state citizenship opens the door to suit in either state or federal court in multiple states.

In contrast, for a private mediation in an ongoing case, the court where the underlying dispute is on the docket will often decide confidentiality disputes that arise out of the mediation of the case. This would be the pattern, for example, if the case does not settle and one party seeks to admit evidence from the mediation as the suit progresses. Additionally, with the advent of court-sponsored mediation programs, parties might well assume that any confidentiality issues arising during or after the mediation would be decided by the court under whose auspices the mediation occurred or perhaps in an appeal from that court.

While this linkage between the forum for the initial suit and the forum for the confidentiality dispute exists in many cases,[36] it is certainly not guaranteed; many possible forums may be available and the initial forum may even be foreclosed. For instance, when a lawsuit is settled in mediation and the proceeding is terminated, a later challenge to the agreement can be brought in any court where jurisdiction and venue requirements are satisfied. This may introduce flexibility that permits filing in a different court, but it may also bring limitations that prevent filing in the court where the underlying suit was pending. If the parties settle and dismiss a suit brought in federal court under federal question jurisdiction, for example, that court may lack jurisdiction for a subsequent enforcement action brought under state law.[37] Furthermore, whether the lawsuit was settled or not, mediation communications may be relevant in a later suit, possibly brought in a

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[36] *See, e.g.*, Pueblo of San Ildefonso v. Ridlon, 90 F.3d 423 (10th Cir. 1996) (imposing sanctions on attorney for failure to appear at court-sponsored mediation conference); Clark v. Stapleton Corp., 957 F.2d 745 (10th Cir. 1992) (per curium) (discussing breach of confidentiality in Tenth Circuit mediation program); Doe v. Nebraska, 971 F. Supp. 1305 (D. Neb. 1997) (piercing confidentiality to decide motion for sanctions arising out of mediation in district court mediation program); Bernard v. Galen Group, Inc., 901 F. Supp. 778 (S.D.N.Y. 1995) (sanctioning attorney for violation of confidentiality provisions of court's mediation program and referral order).

[37] *See, e.g.*, Morris v. City of Hobart, 39 F.3d 1105, 1111–12 (10th Cir. 1994) (holding cause of action for breach of Title VII settlement agreement created by state law, so federal court lacked jurisdiction). *See generally* Michael E. Solimine, *Enforcement and Interpretation of Settlements of Federal Civil Rights Actions*, 19 RUTGERS L.J. 295, 306–18 (1988) (exploring possible theories of jurisdiction to enforce settlement agreements); Darryl R. Marsch, Note, *Postdismissal Enforcement of Settlement Agreements in Federal Court and the Problem of Subject Matter Jurisdiction*, 9 REV. LITIG. 249, 261–66 (1990) (discussing considerations in anticipating the need for judicial enforcement of a settlement agreement in a dismissed federal case). If the parties agree to do so, they may maintain jurisdiction in federal court by entering their settlement as a judgment or a consent decree. The settlement would then become a public record subject to disclosure. *See* Solimine, *supra*, at 302.

different court and perhaps involving different parties. The implications of this forum uncertainty are not merely theoretical; the cases discussed below indicate that as litigation of confidentiality issues has increased, so have instances where questions arising out of a mediation of a case in litigation, including cases from court mediation programs, have been decided elsewhere under different confidentiality provisions.

Confidentiality disputes move among courts within both the federal and state court systems. When a mediation is court-sponsored, this means another court may decide confidentiality issues connected to the mediation. For example, confidentiality questions from appellate mediations often need to be decided by trial courts. A motion to enforce a settlement agreement allegedly reached in appellate mediation typically requires a trial court to hold a hearing.[38] Federal mediated class-action settlements need district court examination and approval.[39] In addition, after a mediated settlement terminates a case, the confidentiality of that mediation may later become an issue in a suit brought in another forum within the same court system.[40]

Even more significant from the perspective of ensuring mediation confidentiality, disclosure issues also cross the line between the state and federal court systems. The federal courts have been a venue for confidentiality disputes arising out of state, and state court, mediation programs.[41] Conversely, mediations held during federal court proceedings

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[38] *See, e.g.*, Martin v. Automobili Lamborghini Exclusive, Inc., No. 98-6621 (S.D. Fla. June 12, 2000) (applying state law in denying motion to enforce settlement agreement purportedly reached during mediation on interlocutory appeal to the Eleventh Circuit); Lyons v. Booker, 982 P.2d 1142 (Utah Ct. App. 1999) (remanding for consideration of motion to enforce alleged mediated settlement).

[39] FED. R. CIV. P. 23(e) (requiring court approval for dismissal or compromise of class action). This approval generally involves a "fairness hearing" on the settlement. *See, e.g.*, Bailey v. Great Lakes Canning, Inc., 908 F.2d 38, 42 (6th Cir. 1990) (per curium) ("The district court may not approve a [class action] settlement unless it determines after hearings that the settlement is fair, adequate, and reasonable, as well as consistent with the public interest."). Other settlements may also require hearings and court approval under state law. *See, e.g.*, Burke v. Smith, 252 F.3d 1260, 1265 (11th Cir. 2001) (holding that Alabama law required district court to hold a hearing to determine the fairness of settlement before it would bind minor party).

[40] *See, e.g.*, Datapoint Corp. v. Picturetel Corp., No. Civ.A. 3:93-CV-2381D, 1998 WL 25536 (N.D. Tex. Jan. 14, 1998) (deciding challenge to settlement reached in a related case in the Southern District of Texas mediation program).

[41] *See, e.g.*, *In re* March, 1994—Special Grand Jury, 897 F. Supp. 1170 (S.D. Ind. 1995) (refusing to recognize state court mediation privilege as federal common law or to quash federal grand jury subpoena of mediator's testimony about mediation held under auspices of state court); Smith v. Smith, 154 F.R.D. 661 (N.D. Tex. 1994) (quashing subpoena to mediator to testify regarding claim that plaintiff was fraudulently induced to sign settlement reached in state court mediation program), *aff'd*, No. 3:92-CV-0170-D,

may end up in dispute before state courts.[42] This is especially likely when a federal court lacks jurisdiction over a mediated settlement agreement.[43]

This flexibility of potential forums means that predictability for confidentiality is a joint federal and state problem. For many mediations, confidentiality issues could be raised in the courts of either system. In the federal courts, the great variability in state confidentiality provisions is a major contributing factor to the lack of predictability because federal courts apply state confidentiality rules in many instances. Federal law also fosters unpredictability, because the common law process has operated slowly and few jurisdictions have articulated principles for mediation confidentiality. Moreover, the relevant federal statutes and rules contemplate inconsistent approaches to the development of confidentiality for mediation. The next section considers the extreme variability of the confidentiality protections provided by current state and federal law and the problems associated with them.

B. *What Protection Will State or Federal Law Provide?*

When state law will govern the confidentiality of a mediation, parties face uncertainty in predicting the level of protection primarily because of the huge variation in state provisions. These variations occur in the types of mediations given statutory protection, the nature and scope of that protection, and the exceptions that permit disclosures despite confidentiality protection.

There is a fundamental discrepancy among the states: about half of them have not enacted a comprehensive statute or rules to govern confidentiality in mediation. The modern trend in the states is to adopt mediation statutes or evidentiary rules of general application to govern mediations without limitation to the subject matter of the dispute or the setting of the

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1996 WL 768061 (N.D. Tex. Oct. 9, 1996); United States v. Gullo, 672 F. Supp. 99 (W.D.N.Y. 1987) (holding federal criminal defendant's statements made in state sponsored mediation privileged); Hudgins v. Sec. Bank of Whitesboro, 188 B.R. 938 (Bankr. E.D. Tex. 1995) (determining validity of settlement agreement from state court mediation).

[42] *See, e.g.*, Republican Co. v. Albano, No. 99-312 (Hampden Co. Mass. Sup. Ct. Apr. 2, 1999) (deciding claim for access to confidential agreement reached in federal Court of Appeals mediation program).

[43] *See, e.g.*, Allen v. Leal, 27 F. Supp. 2d 945, 949–50 (S.D. Tex. 1998) (finding no supplemental jurisdiction for counterclaim on breach of mediation settlement agreement allegedly coerced by mediator; remanding to state court). In a settled case, however, parties may be able to retain the jurisdiction of the federal court that entered the dismissal by entering the agreement as a judgment or a consent decree. *See generally* Solimine, *supra* note 37, at 301–02; Marsch, *supra* note 37, at 256–66.

mediation.[44] In contrast, older state statutes often establish a particular mediation program and thus confer confidentiality protections that are limited to mediations within a specific context.[45] In jurisdictions without a general mediation statute, the operative limits on disclosure of a mediation communication will depend on whether or not the mediation is covered by one of these specialized statutes.[46] This creates at least two classes of mediations: those with special state protection for confidentiality and those without. In jurisdictions with multiple statutes for separate mediation

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[44] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); ARK. CODE ANN. § 16-7-206 (Michie 1999); CAL. EVID. CODE §§ 1115–1128 (West Supp. 2001); IOWA CODE ANN. §§ 679C.1–679C.5 (West Supp. 2001); KAN. STAT. ANN. § 60-452a (Supp. 2000); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); ME. R. EVID. § 408; MASS. GEN. LAWS. ch. 233, § 23C (2000); MINN. STAT. ANN. § 595.02(1a) (West 2000); MO. ANN. STAT. § 435.014 (West 1992 & Supp. 2001); MONT. CODE ANN. § 26-1-813 (1999); NEB. REV. STAT. ANN. §§ 25-2901 to 25-2921 (Michie 1995); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); N.D. CENT. CODE § 31-04-11 (1997); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998); OKLA. STAT. ANN. tit. 12, §§ 1801–1813 (West 1993 & Supp. 2001); OR. REV. STAT. §§ 36.100–36.245 (1999); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001–154.073 (Vernon 1997 & Supp. 2001); VA. CODE ANN. §§ 8.01-581.21 to 8.01-581.23 (LEXIS 2000); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WIS. STAT. ANN. § 904.085 (West 2000); WYO. STAT. ANN. §§ 1-43-101 to 1-43-104 (LEXIS 2001).

[45] *See, e.g.*, GA. CODE ANN. § 45-19-36(e) (1998) (fair employment); 775 ILL. COMP. STAT. ANN. 5/7B-102(E) (West 1996 & Supp. 2001) (human rights); IOWA CODE ANN. § 654A.13 (West 1995 & Supp. 2001) (farmer-creditor disputes); IOWA CODE ANN. § 216.15B (West 2000) (civil rights); ME. REV. STAT. ANN. tit. 5, § 3345(10) (West Supp. 2000) (natural gas pipeline disputes); NEB. REV. STAT. ANN. § 48-168 (Michie 1998) (workers' compensation); N.C. GEN. STAT. § 7A-38.3 (1999) (agricultural nuisance disputes); VT. STAT. ANN. tit. 9 § 4555 (LEXIS Supp. 2001) (human rights); WIS. STAT. ANN. § 767.11(11) (West 1993) (Wisconsin Supreme Court Order 93-03 repealed subsection (11)) (family court). Many states have separate statutes or court rules to govern court-sponsored mediation of ADR programs. *See, e.g.*, COLO. REV. STAT. ANN. §§ 13-22-301 to 13-22-313 (West 2000); FLA. STAT. ANN. § 44.102 (West Supp. 2001); N.H. SUP. CT. R. 170 (2001); N.C. GEN. STAT. § 7A-38.1 (1999); UTAH CODE ANN. §§ 78-31b-2 to 78-31b-9 (1996 & Supp. 2001); VA. CODE ANN. §§ 8.01-576.4 to 8.01-576.12 (LEXIS 2000). Overall, there are hundreds of statutes governing specific mediation programs. *See* COLE ET AL., *supra* note 5, app. A; Kentra, *supra* note 10, app. at 757.

[46] For example, in states with a court-sponsored program that lack a general mediation statute, confidentiality protection may depend on whether or not the dispute was filed in court prior to convening the mediation. *See, e.g.*, Vernon v. Acton, 732 N.E.2d. 805, 808 n.5 (Ind. 2000) (reaffirming that Indiana ADR Rules apply only to civil and domestic relations litigation filed in Indiana courts; the confidentiality provisions do not govern private mediation held by agreement of the parties prior to litigation).

programs, the resulting patchwork of statutory coverage is a major factor contributing to the variety in confidentiality protection for mediation.

For some confidentiality disputes, that patchwork may include a relatively narrow state evidentiary exclusion that applies to settlement offers. Thirty-eight states have adopted, without substantial variation, Rule 408 of the Federal Rules of Evidence (FRE).[47] This rule excludes evidence of compromise offers on disputed claims when that evidence is submitted to prove liability or the amount of damages.[48] Depending on the circumstances of the disclosure, it may provide partial protection for mediation communications. Some of the states that lack a general mediation statute have made their version of FRE 408 explicitly applicable to mediation.[49] In other states without a general statute, this provision serves as a default rule for all mediations that are not covered by special confidentiality legislation for a specific mediation program. Commentators have cautioned, however, that the rule does not cover all mediation communications and that the scope of its protection is limited in important ways.[50]

But even mediations governed by a single comprehensive state statute are subject to significant differences in protection. These statutes, enacted over several decades of experimentation with mediation in the states, are characterized by their variation. First, there is no agreement on a definition of mediation to delineate their coverage. Some statutes omit any definition

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[47] Ehrhardt, *supra* note 12, at 102 n.38 (1999) (citing 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE T-1 (Joseph M. McLaughlin ed., 2d ed. 1998) (Table of State and Military Adaptations of Federal Rules of Evidence)).

[48] In relevant part, FRE 408 provides:

> RULE 408. COMPROMISE AND OFFERS TO COMPROMISE. Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . . This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[49] *See, e.g.*, HAW. R. EVID. 408; VT. R. EVID. 408. Professor Ehrhardt argues that these rules apply to mediation even in the absence of this specification. *See* Ehrhardt, *supra* note 12, at 103–04 ("No specific statute or court-rule is necessary for Rule 408 to be applicable in mediation proceedings, regardless of whether the mediation is voluntary or court-ordered. Mediations involve statements made during attempts to settle or compromise a claim."). *But see infra* note 126 and accompanying text.

[50] *See infra* text accompanying notes 124–127.

whatsoever.[51] Among those that do include them, definitions can differ substantially.[52] Second, the states selected their protection for mediation confidentiality from a smorgasbord of legal frameworks. They may employ a privilege, testimonial incapacity, a broad evidentiary exclusion, and/or a limited settlement negotiation exclusion. Each of these legal mechanisms has a different scope and applicability. Third, even among states that use the same legal framework, there can be significant differences in the degree of confidentiality protection due to variations in coverage and exceptions.

Federal law does not offer much greater predictability. Parties seeking to invoke a federal mediation privilege have met with mixed success, and development of federal common law for mediation has just begun. The general federal evidentiary provisions governing testimonial capacity and evidentiary exclusions do not offer significant protection for mediation. There are, in addition, some federal statutory protections designed especially for mediation, but they are not comprehensive. Following the pattern of the early state statutes, federal enactments govern mediation confidentiality for mediation programs only in defined settings. The most notable to date apply to administrative agency mediations[53] and mediation programs in federal courts.[54]

This section explores the sources of variation among state confidentiality protections and between state and federal provisions.[55] It is this variability in protection for confidentiality, when coupled with the chaos of the choice-of-

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[51] *See, e.g.*, ARK. CODE ANN. § 16-7-206 (Michie 1999); KAN. STAT. ANN. § 60-452 (Supp. 2000); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); N.D. CENT. CODE § 31-04-11 (1997); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001).

[52] *Compare* MASS. GEN. LAWS ch. 233, § 23C (2000) (defining mediation to require a written agreement with a mediator who has thirty hours of training, four years of experience, or is accountable to a mediation agency appointed by a court or agency or that has existed for three years), *with* IOWA CODE ANN. § 679C.1 (West Supp. 2001) (defining mediation as a "process in which an impartial person facilitates the resolution of a dispute by promoting voluntary agreement of the parties," commencing at the time of initial contact and terminating when a resolution is reached or the mediation process concludes). *See generally* Erin L. Kuester, *Confidentiality in Mediation: A Trail of Broken Promises*, 16 HAMLINE J. PUB. L. & POL'Y 573, 579–80 (1995) (discussing wide variations in scope and coverage of state mediation statutes).

[53] Administrative Dispute Resolution Act, 5 U.S.C. § 574 (2000).

[54] Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652 (Supp. V 1999).

[55] Other sources on the variability of state-law confidentiality provisions include Kirtley, *supra* note 10, and the Reporter's Notes to the Uniform Mediation Act. Ehrhardt, *supra* note 12, describes the variability in federal court local rules on mediation confidentiality. For a discussion of variability in mediation confidentiality in criminal proceedings, see Deason, *supra* note 11, at 109–10.

law rules discussed in section C, that fuels uncertainty and threatens the sense of predictability so important for fostering mediation.

1. *Mediation Privilege*

Many of the states with general mediation statutes or evidentiary rules chose privilege as the most effective framework for protecting confidentiality in legal proceedings, and this form of protection was recently selected for the Uniform Mediation Act.[56] Generally speaking, a privilege is an evidentiary construct that allows its holder to refuse to disclose (and to block others from disclosing) a communication in discovery or as evidence, unless the holder has waived the privilege or the communication fits into an exception to the privilege.[57] The provision for waiving a privilege gives flexibility to parties who do not want to maintain the confidentiality of their mediation communications. It also can accommodate mediation parties such as governmental bodies subject to sunshine laws that grant public access to their mediation communications.

One source of variation among state privilege statutes are discrepancies in the designation of the holder(s), which is more difficult in mediation than with privileges that protect confidential relationships with a trusted advisor. Mediation involves a complex flow of communications between adversarial parties, and it is distinguished by the participation of the mediator as a facilitator for those communications. Some sensitive exchanges may be made directly from one party to another. Other discussions are held between a party and the mediator in a caucus. The mediator in turn talks with both parties and may, or may not, relay information between them. These multiple paths of communication have led to ambiguity and lack of conformity in the designation of the holders of the privilege.[58] Many statutory mediation privileges fail entirely to designate who holds and who may waive the

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[56] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); IOWA CODE ANN. §§ 679C.2–679C.3 (West Supp. 2001); KAN. STAT. ANN. § 60-452a (Supp. 2000); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); ME. R. EVID. § 408; OHIO REV. CODE ANN. § 2317.023 (Anderson 1998); OKLA. STAT. ANN. tit. 12, § 1805 (1993); OR. REV. STAT. § 36.223 (1999); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon Supp. 2001); VA. CODE ANN. § 8.01-581.22 (LEXIS 2000); WASH. REV. CODE ANN. § 5.60.070 (West 1995); WYO. STAT. ANN. § 1-43-103 (LEXIS 2001); UNIF. MEDIATION ACT § 4 (2001), *available at* http://www.pon.harvard.edu/guests/uma/.

[57] MCCORMICK, *supra* note 14, § 298.

[58] *See* Joshua P. Rosenberg, *Keeping the Lid on Confidentiality: Mediation Privilege and Conflict of Laws*, 10 OHIO ST. J. ON DISP. RESOL. 157, 159–60 (1994).

privilege.[59] Among those statutes that do specify a holder, some designate the parties to the mediation as the holders;[60] others make the mediator either an independent holder[61] or a joint holder with the parties.[62]

The designation of a holder is important for connecting a mediation privilege to the rationales for protecting confidentiality. When the mediation parties hold the privilege, they can use it to protect their interests in confidentiality with a level of control over use of their communications that will encourage them to participate fully in the mediation. Because the parties' interests conflict in part, this assurance must include the ability to prevent later disclosure by the other participant(s). In contrast, a privilege that makes a mediator an independent holder as to her own communications protects the institution of mediation. It gives a mediator the tools to maintain

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[59] The omission of a designation for the holder characterizes both general mediation provisions, *see, e.g.*, MASS. GEN. LAWS ch. 233 § 23C (2000); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073 (Vernon Supp. 2001); and statutes governing special applications of mediation, *see, e.g.*, 710 ILL. COMP. STAT. ANN. 20/6 (West 1999) (community dispute resolution centers); IND. CODE ANN. § 20-7.5-1-13 (West 1995) (university employee unions); KY. REV. STAT. ANN. § 336.153 (Michie 1995) (labor disputes); ME. REV. STAT. ANN. tit. 26, § 1026 (West 1988 & Supp. 2001); MASS. GEN. LAWS ch. 150, § 10A (1999) (labor disputes).

[60] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238(B)(1) (West 1994); ARK. CODE ANN. § 11-2-204 (LEXIS 1996 & Supp. 1999) (labor disputes); FLA. STAT. ANN. § 44.102(3) (West Supp. 2001) (court-ordered mediation); FLA. STAT. ANN. § 61.183 (West 1997) (divorce); KAN. STAT. ANN. § 23-606 (1995) (repealed 2000) (domestic disputes); N.C. GEN. STAT. § 41A-7 (1999) (fair housing); TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon 2001); VA. CODE ANN. § 8.01-581.22(i) (LEXIS 2000); WASH. REV. CODE ANN. § 5.60.070(1)(a) (West 1995). *See also* WYO. STAT. ANN. § 1-43-103(b) (LEXIS 2001) (providing parties hold privilege that mediator may claim on their behalf).

[61] *See, e.g.*, IOWA CODE ANN. § 679C.3 (West Supp. 2001); KAN. STAT. ANN. § 60-452a(a) (Supp. 1999); LA REV. STAT. ANN. § 9:4112(E) (West Supp. 2001); OHIO REV. CODE ANN. § 2317.023(C)(1), (2) (Anderson 1998); OR. REV. STAT. § 36.222(3) (1999); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(b) (Vernon Supp. 2001); WASH. REV. CODE ANN. § 5.60.070(1) (West 1995).

[62] *See, e.g.*, COLO. REV. STAT. ANN. § 13-22-307(2) (West 2000) (court-annexed dispute resolution) (joint holders); UTAH CODE ANN. § 78-31b-8 (1996 & Supp. 2001) (court ADR program) (joint holders); CAL. EVID. CODE § 1122 (West Supp. 2001) (making the mediator an additional holder in some respects); Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1129 n.23 (N.D. Cal. 1999) (discussing application of CAL. EVID. CODE § 1122).

The Uniform Mediation Act provides privileges for both disputants' and mediators' communications. The parties to a mediation hold both privileges jointly and each can assert it to block testimony on any mediation communication. The mediator has an independent privilege to block testimony on the mediator's own communications, as do nonparty participants in the mediation. UNIF. MEDIATION ACT § 4(b) (2001).

neutrality and to protect against parties' fears that she will reveal their confidences if called to testify. A dual privilege protects both confidentiality goals.[63]

Exceptions to mediation privileges, which accommodate competing needs for access to mediation communications, also vary dramatically. Each exception represents a legislative decision that in certain circumstances the benefits of mediation confidentiality are outweighed by the benefits of disclosing the information. These judgments often involve close policy calls, with the result that both the form of exceptions and their content vary greatly among the jurisdictions.[64]

Some states have made an overall policy decision to subordinate mediation confidentiality to all statutory disclosure requirements, such as open meetings acts or reporting requirements.[65] Alternatively, in some states exceptions take the form of separate legislative policy decisions for particular disclosures. These confidentiality exceptions are typically contained in an exclusive list of the circumstances in which the legislature has determined that public policy warrants disclosure of mediation communications.[66] Yet another approach assigns the task of reconciling competing policies to the courts through balancing on a case-by-case basis.[67] Some jurisdictions have selected more than one of these approaches depending on the type of disclosure at issue.

The substantive content of exceptions that permit disclosure is equally variable. A frequent, but not ubiquitous, statutory exception to mediation

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[63] *See, e.g.*, Kirtley, *supra* note 10, at 30–35.

[64] One especially variable exception to mediation privileges concerns the treatment of mediated settlements. This topic is considered separately *infra* text accompanying notes 141–55.

[65] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238(B)(3) (West 1994); COLO. REV. STAT. ANN. § 13-22-306 (West 1997); IOWA CODE ANN. § 679C.2(3), 679.3(2) (West Supp. 2001); KAN. STAT. ANN. § 60-452a(b)(4) (Supp. 2000).

[66] *See, e.g.*, IOWA CODE ANN. § 679C.2-679C.3 (West Supp. 2001); OR REV. STAT. § 36.220-36.222 (1999); WYO. STAT. ANN. § 1-43-103(c) (LEXIS 2001).

[67] *See, e.g.*, LA. REV. STAT. ANN. § 9:4112(D) (West Supp. 2001) (to resolve conflicts with other legal disclosure requirements); LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2001) (for judicial determination of the meaning or enforceability of an agreement resulting from mediation); OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998) (permitting disclosure to prevent manifest injustice on determination, after a hearing, that necessity for disclosure outweighs importance of protecting confidentiality in mediation); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (Vernon Supp. 2001) (providing procedure relative to disclosure when mediation confidentiality conflicts with other legal requirements for disclosure of communications).

confidentiality is provided for evidence of child abuse or neglect.[68] Furthermore, even in states without this mediation exception, mediators often hold professional credentials that require them to report child or elder abuse or neglect to state authorities under other statutes. These reporting obligations may create conflicting obligations for mediators or override mediation confidentiality protections.[69]

Professional misconduct raises other competing obligations that have prompted some states to include an exception to their mediation confidentiality statute.[70] It is also a subject that has motivated courts to create ad hoc exceptions to mediation privileges in particular circumstances.[71] In states without this exception, lawyer mediators and counsel for a party may be subject to conflicting obligations if required by professional standards to report unprofessional conduct that occurs during mediation, such as a violation of ethical rules by a participating attorney.[72]

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[68] *See, e.g.*, ARIZ. REV. STAT. ANN. § 8-805(B) (West 2000); IOWA CODE ANN. § 679C.2(5) (West Supp. 2001); KAN. STAT. ANN. § 60-452a(b)(2) (Supp. 2000); MINN. STAT. ANN. § 595.02(4)(a) (West 2000); N.C. GEN. STAT. § 7A-38.1 (l) (1999); N.H. REV. STAT. ANN. § 328-C:9(III)(c) (1995); OHIO REV. CODE ANN. § 3109.052(C) (Anderson Supp. 2000); OR. REV. STAT. § 36.220(5) (1999); TENN. CODE ANN. § 36-4-130(b)(5) (1996); UTAH CODE ANN § 78-31b-8(6) (1996 & Supp. 2001); VA. CODE ANN. § 63.1-248.3(A)(10) (LEXIS Supp. 2001); WYO. STAT. ANN. § 1-43-103(c)(iii) (LEXIS 2001). *But see* MONT. CODE ANN. § 41-3-437(5)) (2001) (attorney-client and mediation privileges apply in child abuse proceeding).

[69] *See, e.g.*, 325 ILL. COMP. STAT. ANN. 5/4 (West Supp. 2000) (requiring disclosures of child abuse even when it is revealed in a privileged communication); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(e) (Vernon Supp. 2001) (stating that confidentiality of mediation communications does not affect the duty to report abuse or neglect under the state Family Code or Human Resources Code).

[70] *See, e.g.*, LA. REV. STAT. ANN. § 9:4112(B)(1)(b) (West Supp. 2001) (permitting testimony limited to issue of noncompliance in connection with motion for sanctions); MINN. STAT. ANN. § 595.02(1a)(2), (3) (West 2000) (permitting mediator testimony for statements or conduct that constitute professional misconduct or could give rise to disqualification proceedings for an attorney); N.C. GEN. STAT. § 7A-38.1 (l) (1999) (permitting mediator testimony for sanction proceedings).

[71] *See, e.g.*, *In re* Young, 253 F.3d 926, 927 (7th Cir. 2001) ("Although [appellate mediations] are of course confidential for most purposes, their contents may be revealed insofar as necessary for the decision of an issue of alleged misconduct in them."); Pueblo of San Ildenfonso v. Ridlon, 90 F.3d 423, 424 n.1 (10th Cir. 1996); *In re* Waller, 573 A.2d 780, 785 n.5 (D.C. Ct. App. 1990) (stating that confidentiality requirement not intended to preclude mediator from reporting possible violation of disciplinary rules to judge); Lawson v. Brown's Day Care Ctr., Inc., No. 98–447, 2001 WL 468510 (Vt. Apr. 16, 2001) (disapproving disclosure of mediation communications in report of attorney misconduct but holding sanctionable only with finding of bad faith).

[72] *See generally* Kentra, *supra* note 10, at 717–18.

Mediation may also precipitate a claim of misconduct on the part of the mediator. Although mediator qualifications have been established by statute or court rules in a majority of states,[73] a party needs some mechanism to object to a mediator's inappropriate conduct. Moreover, when mediation is required or provided by a court, there is a special obligation to ensure competent mediators. Several state statutes waive confidentiality when a party brings a legal action against a mediator to permit the party to present evidence and the mediator to defend against the claim.[74] Courts in states without this statutory exception have also permitted testimony under these conditions.[75]

In sum, state mediation privilege statutes vary greatly in both their structure and their substantive exceptions that permit disclosures. This statutory variation gives significance to choice-of-law questions, and hence creates uncertainty about coverage, even among states that have chosen a privilege as the means to protect mediation confidentiality. Court-created exceptions contribute an additional degree of uncertainty. While case-by-case balancing is built into some privilege statutes, courts also have made

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[73] *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 159 (3d ed. 1999). Several states have also established procedures to certify mediators in some contexts. *See* 1 COLE ET AL., *supra* note 5, § 11:04.

[74] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238(B)(2) (West 1994); IOWA CODE ANN. § 679C.2(6) (West Supp. 2001); KAN. STAT. ANN. § 60-452a(b)(1) (Supp. 2000); MINN. STAT. ANN. § 595.02(1a) (West 2000); OR. REV. STAT. § 36.222(5) (1999); WASH. REV. CODE ANN. § 5.60.070(1)(g) (West 1995); *see also* COLO. REV. STAT. ANN. § 13-22-306(2)(d) (West 2000) (exception limited to action alleging willful or wanton misconduct of mediator or mediation organization); FLA. STAT. ANN. § 44.102 (4) (West Supp. 2001) (exception for disciplinary proceedings against mediator in court-ordered mediation); OKLA. STAT. ANN. tit. 12, § 1805(F) (West 1993) (privilege waived as to party bringing action); VA. CODE ANN. § 8.01-581.22(ii) (LEXIS 2000) (exception for action for damages arising out of mediation).

Florida attempts to minimize the damage to the parties' interest in confidentiality by requiring that confidential communications revealed in mediator's disciplinary proceeding must be redacted before the file can be made public. FLA. STAT. ANN. § 44.102(4) (West Supp. 2001).

[75] *See, e.g.*, Allen v. Leal, 27 F. Supp. 2d 945, 947 n.4 (S.D. Tex. 1998) (releasing mediator and plaintiff from confidentiality requirement when plaintiff sought to repudiate mediated agreement claiming coercion by mediator); McKinlay v. McKinlay, 648 So. 2d 806, 810 (Fla. Dist. Ct. App. 1995) (permitting mediator to testify in spite of privilege after party claimed settlement resulted from mediator's intimidation); Evans v. State, 603 So. 2d 15, 15 (Fla. Dist. Ct. App. 1992) (allegation of mediator bias after judge mediated case).

exceptions without guidance from statutory standards, only increasing the range of uncertainty in predicting confidentiality protections.[76]

There is no equivalent under federal law to a general state confidentiality statute. There are, however, analogies to state statutes that govern particular mediation programs. These include the Administrative Dispute Resolution Act, which contains confidentiality provisions for agency mediation programs,[77] and the Alternative Dispute Resolution Act of 1998, which requires federal district courts to protect confidentiality in their ADR programs by local rule.[78] Federal common law is also relevant to mediation confidentiality, as a small number of courts have adopted a mediation privilege and others may consider one in the future.

The Administrative Dispute Resolution Act does not label its confidentiality provision as a privilege, but it functions more like a privilege than any other identifiable legal category of confidentiality protection. The Act prohibits ADR neutrals and parties from voluntarily disclosing communications or from being required to disclose communications through discovery or compulsory processes.[79] Like a privilege, it permits waivers and delineates exceptions for communications that may be made public. The Act also grants courts flexibility to create exceptions for disclosure, which are permitted when necessary to "prevent a manifest injustice; help establish a violation of law; or prevent harm to the public health or safety . . . ."[80] One significant difference from any state-law privilege, however, is that communications made by a party during a joint session are not protected by the Act's confidentiality provision.[81] Thus, its coverage is more limited than state law in a state with a mediation privilege.

The Alternative Dispute Resolution Act, in contrast, does not itself prescribe the terms for confidentiality. It requires each federal district court to adopt a local rule to "provide for the confidentiality of the alternative dispute resolution process and to prohibit disclosure of confidential dispute resolution communications."[82] Several courts have held that this requirement

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[76] *See infra* note 151.

[77] 5 U.S.C. § 574 (2000).

[78] 28 U.S.C. § 652(d) (Supp. V 1999).

[79] 5 U.S.C. § 574 (a), (b).

[80] 5 U.S.C. § 574 (a)(4), (b)(5). *But see In re* Grand Jury Subpoena Dated Dec. 17, 1996, 148 F.3d 487, 492 (5th Cir. 1998) (holding, without considering this exception, that Act did not create a privilege from disclosure in grand jury proceedings for communications made in state agricultural loan mediation program).

[81] 5 U.S.C. § 574(b)(7).

[82] 28 U.S.C. § 652(d). The Act does not define confidentiality or the scope of protection Congress intended for confidentiality. NIEMIC ET AL., *supra* note 7, at 94.

does not itself create a mediation privilege.[83] Instead, in the words of one court, it "provide[s] only a general mandate to establish the confidentiality of court-ordered mediation proceedings."[84] Under this interpretation, absent a privilege, "information exchanged in confidential mediation, like any other information, is subject to the liberal discovery rules of the Federal Rules of Civil Procedure . . . ."[85] There is, however, some disagreement about the necessity of using the precise label of "privilege" in order to make statutory promises of mediation confidentiality effective in a legal proceeding. One court has concluded that any rule that meets the criteria for the Act's required confidentiality provision could be enforced in the same way that the holder of a privilege is entitled to refuse to produce relevant evidence and to prevent others from disclosing protected communications.[86] In any event, unlike the Act, some of the local rules it requires do use the language of privilege in establishing confidentiality requirements for their mediation programs.[87] As discussed below, however, the force of these provisions is uncertain.[88]

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[83] *See, e.g.*, FDIC v. White, 76 F. Supp. 2d 736, 738 (N.D. Tex. 1999); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000). *See also* Datapoint Corp. v. Picturetel Corp., No. Civ.A.3:93-CV-2381D, 1998 WL 25536, at *2 (N.D. Tex. Jan. 14, 1998) (finding no privilege in federal court local rule that makes mediations confidential and protects them from disclosure).

[84] *Folb*, 16 F. Supp. 2d at 1176. This conclusion is consistent with decisions from outside the mediation arena which have distinguished between a promise of confidentiality and a privilege, holding that only the latter has evidentiary force. *See, e.g.*, Pearson v. Miller, 211 F.3d 57, 68 (3d Cir. 2000) (finding confidentiality protections for juveniles' files do not necessarily create a privilege); EEOC. v. Illinois Dept. of Employment Sec., 995 F.2d 106, 109 (7th Cir. 1993) (finding confidentiality provision for unemployment compensation proceedings does not create privilege); ACLU of Miss. v. Finch, 638 F.2d 1336, 1342–45 (5th Cir. 1981) (holding state statute sealing records did not create privilege in civil rights suit); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1204–05 (9th Cir. 1975) (holding immigration files confidential but not privileged from discovery). *See generally* 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 171 (2d ed. 1994) (distinguishing duty of confidentiality from privilege).

[85] *Folb*, 16 F. Supp. 2d at 1171.

[86] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1120 n.15 (N.D. Cal. 1999). *See also infra* text accompanying notes 99–94 for a description of cases quashing subpoenas for testimony by mediators for the Community Relations Service, whose statutory authorization specifies that its activities "shall be conducted in confidence and without publicity." 42 U.S.C. § 2000g-2(b) (1994). *Cf.* State ex rel. Schneider v. Kreiner, 699 N.E.2d 83, 86 (Ohio 1998) (enforcing mediation statute that calls for confidentiality and nondisclosure as if it established a privilege, even though the statute does not use that term).

[87] *See, e.g.*, M.D. FLA. R. 9.07(b); S.D. FLA. GEN. R. 16.2.G.2; N.D. ILL. GEN. R. 5.10(C); E.D. WASH. LOCAL R. 16.2(d)(3); S.D. W. VA. CIV. R. 5.10(f). *See also* D.C.

In the realm of federal common law, rules for mediation confidentiality are sparse.[89] As described below, only a few courts have considered whether to recognize a common-law privilege for mediation communications and, therefore, this issue is likely to be one of first impression with all the uncertainty that entails. Moreover, even among federal courts that do recognize a mediation privilege, its contours will remain uncertain for some time as consensus on a privilege emerges slowly in response to the circumstances of each case.

Although it did not use the term "privilege," the first court to articulate a federal common law principle to protect the mediation process from the damage by mediator testimony did so in the labor context. In *NLRB v. Joseph Macaluso, Inc.*, a company and union that were participating in a hearing before the NLRB on a charge of unfair labor practices against the company had contradictory versions of their mediated negotiations and disagreed on whether or not they had reached a contract agreement.[90] As is typical in such situations, testimony by the Federal Mediation and Conciliation Service (FMCS) mediator would have proved dispositive in resolving the parties' conflicting versions of how their mediation concluded. The NLRB initially issued a subpoena to the mediator but revoked it in response to a motion from the FMCS. The Ninth Circuit upheld the revocation, reasoning that requiring the mediator to testify would destroy the impartiality of the FMCS that is necessary for effective mediation. This would in turn undermine the

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Cir. Order Establishing Appellate Mediation Program (Apr. 14, 1998). Other districts use language that functionally creates a privilege although they do not identify it as a such. *See, e.g.*, N.D.N.Y. R. 83.11-5(4) ("Mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during mediation."); D. MASS. R. 16.4(f) ("Mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mediation . . . shall be a confidential communication. No admission, . . . or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."). For a listing of additional districts with mediation privileges, see Ehrhardt, *supra* note 12, at 99 n.33.

[88] *See infra* text accompanying notes 285–88.

[89] *See* Wilson v. Attaway, 757 F.2d 1227, 1244–45 (11th Cir. 1985); NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 56 (9th Cir. 1980); Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511 (W.D. Pa. 2000); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000); People v. Reyes, 816 F. Supp. 619, 623 (E.D. Cal. 1992); United States v. Gullo, 672 F. Supp. 99, 104 (W.D.N.Y. 1987).

[90] NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 52–53 (9th Cir. 1980).

system of labor mediation that is essential to maintain industrial peace.[91] Although the court did not identify this principle as a privilege, its analysis and result are consistent with a privilege held by the mediator.

Outside the labor context, the same concern for the effectiveness of mediation has also served as the rationale for quashing mediator subpoenas in order to protect another mediation program established by federal statute—the Community Relations Service (CRS).[92] In cases where parties sought the testimony of CRS mediators, courts reasoned that "[t]he effectiveness of the CRS is . . . dependent upon the actual and perceived impartiality of its mediators."[93] They concluded in each case that the public interest in maintaining that impartiality outweighed the party's need for the testimony and refused to order disclosure.[94]

Federal courts have also recognized a federal common law mediation privilege that reaches beyond mediator testimony. In *United States v. Gullo*, a mediation privilege found in the New York statute establishing community mediation centers was relevant to the case, and the court adopted it as a matter of federal law.[95] The effect was to suppress evidence of a criminal defendant's statements made during a mediation held at one of these centers on issues referred by the police department concerning events that eventually led to his indictment. Because the federal privilege adopted in *Gullo* was motivated by a state mediation program and the protections adopted by the state for that program, it provides a model for harmonizing state and federal law in the elaboration of a federal privilege.

The fullest statement of a federal privilege, distinct from any particular state privilege, was articulated in *Folb v. Motion Picture Industry Pension & Health Plans.*[96] The court was faced with a discovery request concerning a mediation from a litigant who had not participated in the mediation. The court drew on the reasoning of *Macaluso* and concluded that the reasons for

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[91] *Id.* at 55–56.

[92] The function of the CRS program is to help communities resolve disputes relating to discriminatory practices. *See* 42 U.S.C. § 2000g-1 (1994).

[93] *Reyes*, 816 F. Supp. at 623 (quoting decision quashing subpoena for information on electoral mediation effort issued in conjunction with City of Port Arthur v. United States, 517 F. Supp. 987, 1002–03 & n.105 (D.D.C. 1981), *judgment aff'd*, 459 U.S. 159 (1982)).

[94] *Attaway*, 757 F.2d at 1244–45 (quashing subpoena for mediator's testimony on claim of unconstitutional arrest and treatment arising out of civil rights protest); *Reyes*, 816 F. Supp. at 623 (quashing criminal defendant's subpoena for testimony of mediator in school dispute).

[95] United States v. Gullo, 672 F. Supp. 99, 103–04 (W.D.N.Y. 1987).

[96] Folb v. Motion Picture Indus., Pension & Health Plan, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000).

protecting the impartiality of the mediator in *Macaluso* apply with equal force to protecting the confidentiality of mediation proceedings. Both serve the "same ultimate purpose: encouraging parties to attend mediation and communicate openly and honestly in order to facilitate successful alternative dispute resolution."[97] Therefore, the court created and partially defined such a privilege.

The court declined to outline the full contours of a mediation privilege, noting that it was not considering questions such as waiver or exceptions.[98] The circumstances of the case did, however, raise the need to define "mediation" for purposes of the privilege because while some of the statements at issue took place in sessions with the mediator, the final settlement was reached later in discussions directly between the parties. The court delineated a privilege that protects communications between the parties and communications with the neutral only in preparation for, or during, a formal mediation session.[99] In order to avoid stepping onto what it saw as turf controlled by FRE 408, the court categorically excluded from coverage by the privilege all settlement negotiations between the parties subsequent to the formal mediation session. Under the *Folb* court's mediation privilege, therefore, communications are not protected after the session with the mediator even if these subsequent discussions are direct follow-ups that involve information initially disclosed during the mediation. The only way to protect these communications is to return to a formal mediation session with a neutral.[100] This scope of protection is inconsistent with every current form of state protection for mediation confidentiality.

In *Sheldone v. Pennsylvania Turnpike Commission*, another court recognized a federal mediation privilege, drawing its contours from its local court mediation rule.[101] This privilege protects from disclosure "'all written and oral communications made in connection with or during' a mediation conducted before a 'neutral' mediator." The protected communications may not be "used for any purpose" in the court action "or in any other proceedings," and no one is bound by anything said or done in the mediation except by a written settlement agreement or written stipulations.[102] The coverage for communications "in connection with" a mediation is potentially

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[97] *Id.* at 1172.

[98] *Id.* at 1180 n.10.

[99] *Id.* at 1180.

[100] *Id.* at 1180.

[101] Sheldone v. Pennsylvania Turnpike Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000).

[102] *Id.* at 517 (quoting W.D. PA. L. R. 16.3.5(E)).

broader than that of the *Folb* privilege, in that it might include communications following the close of a mediation session.

Other federal courts have emphasized the restraint they are instructed to apply when considering a common law privilege, consistent with the Supreme Court's instruction that privileges "must be strictly construed and accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'"[103] Without a clear mandate from Congress, several have declined invitations to recognize a federal common law mediation privilege in the context of criminal investigations.[104]

In sum, while mediation privileges are probably the most common form of confidentiality protection, their widespread adoption in the states is characterized by extensive variation in scope and coverage. They are less well established in federal law, either by statute or as a matter of federal common law, and often differ in key ways from state mediation privileges. There is thus much potential conflict between federal and state privilege rules for mediation.

2. *Restriction on Mediator Testimony*

Evidence provided by a mediator has the potential to upset the parties' expectations of confidentiality that encourage their participation and to undermine the mediation process more generally by casting doubt on mediator neutrality. Many states target these threats by restricting mediator testimony. Some statutes attempt to prevent all mediator testimony by formally declaring that mediators lack capacity or are incompetent to testify about mediations they have facilitated.[105] Others offer a more limited form of confidentiality protection with provisions that immunize mediators from service of process or subpoena. This prevents mediators from being compelled to testify but leaves them competent to do so voluntarily.[106]

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[103] Trammel v. United States, 445 U.S. 40, 50 (1980) (quoting Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)).

[104] *See generally In re* Grand Jury Subpoena Dated December 17, 1996, 148 F.3d 487, 493 (5th Cir. 1998); *In re* March 1994—Special Grand Jury, 897 F. Supp. 1170, 1173 (S.D. Ind. 1995).

[105] *See, e.g.*, CAL EVID. CODE § 703.5 (West 1995); MINN. STAT. ANN. § 595.02(1a) (West 2000); N.J. STAT. ANN. § 2A:23A-9(c) (West 2000).

[106] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238(C) (West 1994); ARK. CODE ANN. §16-7-206(b) (Michie 1999); KAN. STAT. ANN. § 60-452a(a) (Supp. 2000); LA. REV. STAT. ANN. § 9:4112(b)(2) (West Supp. 2001); MO. ANN. STAT. § 435.014(1) (West 1992 & Supp. 2001); NEV. REV. STAT. ANN. 48.109(3) (Michie 1996); OKLA. STAT.

Rules of testimonial incapacity and immunity from process serve a function in this context by sending a strong signal that it is important to prevent mediator testimony from undermining mediation confidentiality.[107] Nonetheless, by itself, testimonial incapacity is an incomplete measure for ensuring confidentiality in mediation. First, even in states that make mediators incompetent to testify, courts have treated this provision as subject to exception and have taken evidence from the mediator concerning what transpired during a mediation.[108] Second, while these measures insulate the mediator from the inconvenience of testifying and prevent harm to the mediation process that would stem from such testimony, they typically offer no protection from evidence offered by a party to the mediation.[109] Thus, a state restriction on mediator testimony is most effective as an additional provision bolstering the protections provided by at least one other form of confidentiality provision.[110]

ANN. tit. 12, § 1805(C) (West 1993); R.I. GEN. LAWS § 9-19-44 (1997); WIS. STAT. ANN. § 904.085(3)(b) (West 2000). Some courts have adopted similar provisions. *See, e.g.*, IND. ADR R. 2.11, IND. CODE tit. 34 app. Court Rules (Civil) (mediators not subject to process).

[107] *See* Marchal v. Craig, 681 N.E.2d 1160 (Ind. Ct. App. 1997) (holding that parties to mediation may not waive court rule that mediator is not subject to service of process because rule protects the mediation process itself). *But see* Kenny v. Emge, 972 S.W.2d 616, 621 (Mo. Ct. App. 1998) (holding trial court erred in requiring mediator to testify but error did not prejudice plaintiff because mediator's testimony duplicated defendant's account that the parties had reached an agreement).

[108] *See, e.g.*, Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1138 (N.D. Cal. 1999).

[109] There are, however, some states that also protect the parties from judicial process, although this provides no guarantee that they will not testify about the mediation voluntarily. *See, e.g.*, LA. REV. STAT. ANN. § 9:4112(b)(1) (West Supp. 2001); OKLA. STAT. ANN. tit. 12, § 1805(C) (West 1993).

[110] *See infra* text accompanying note 132. In addition to these practical limitations, this legal form of protection for confidentiality has a shaky theoretical foundation, at least in its pure form of testimonial incapacity or incompetence. Competency rules typically emphasize characteristics of witnesses that are necessary for them to testify (such as personal knowledge), or that disqualify them (such as an interest that may make the testimony unreliable). Rules of testimonial incapacity are usually generalizations about witness biases that are deemed serious enough to exclude all testimony by such witnesses as unreliable. *See generally* 27 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6002, at 18 (1990). In mediation, nothing inherent in the mediator's role brings her ability to testify reliably into question; in fact, the mediator's testimony is sought precisely because it may be the only source of reliable, unbiased information. As a result, statutes disqualifying mediators from testifying do not rest entirely easily within the rubric of traditional testimonial incapacity.

In contrast with the variation found in state competency law, the general federal rule is that every person is competent to be a witness.[111] There are, however, some federal equivalents of state provisions that limit service of process or subpoena power for mediation testimony. The Administrative Dispute Resolution Act contains this form of protection,[112] as do some federal court rules for court-annexed mediation programs.[113]

3. *Evidentiary Exclusion*

A significant number of states have chosen to protect confidentiality with an evidentiary exclusion that makes all evidence of mediation communications inadmissible at trial.[114] The general purpose of this evidentiary mechanism is to prevent court actions from discouraging a socially desirable activity. When states exclude evidence of subsequent remedial steps following an injury, for example, their theory is that if this evidence were admissible to show that problems existed prior to the injury, it would create a disincentive for defendants to correct those problems. The legislature has considered the deleterious effects of this disincentive in contrast to the probative value of this type of evidence and decided as a matter of public policy to limit the evidence despite the potential harm to the accuracy of the adjudication.[115] By extension, in the case of mediation, an evidentiary exclusion reflects the judgment that avoiding harm to confidentiality, and consequently to the mediation process, is more valuable than evidence of mediation communications.

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[111] FED. R. EVID. 601. *See infra* note 194. There are, however, exceptions that disqualify judges and jurors from testifying. *See* FED. R. EVID. 605; FED. R. EVID. 606.

[112] 5 U.S.C. § 574(a)–574(b) (2000).

[113] *See, e.g.*, D.C. Cir. Order Establishing Appellate Mediation Program (Apr. 14, 1998) ("Mediators shall not comply with requests for information about mediated cases and if subpoenaed, are hereby instructed not to testify."); N.D. ALA. ADR Plan IV.B.10. (mediator "disqualified as witness . . . in any pending or future action relating to the dispute"); E.D. MO. L.R. 16–6.04 ("neutral shall not testify regarding matters disclosed during ADR proceedings").

[114] *See, e.g.*, ARK. CODE ANN. §16-7-206(a) (Michie 1999); CAL. EVID. CODE § 1119 (West Supp. 2001); MO. ANN. STAT. 435.014 (West 1992 & Supp. 2001); NEB. REV. STAT. ANN. § 25-2914 (Michie 1995); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. § 154.073(a) (Vernon Supp. 2001);WIS. STAT. ANN. § 904.085(3)(a) (West 2000).

[115] MUELLER & KIRKPATRICK, *supra* note 84; § 127, at 26. Other categories of evidence often excluded include liability insurance coverage, juvenile delinquency records, and the payment of medical expenses by a third party (the collateral source doctrine).

At first glance, a categorical exclusion of evidence seems clear, straightforward, and very protective of confidentiality. In its pure form, an exclusion is hard for courts or parties to avoid or modify. All evidence of a particular type is simply banned, and there is no holder who can waive that ban, as can the holder of a privilege. But in practice, many state mediation exclusions are not pure. Most contain exceptions that permit certain disclosures[116] and some include waiver opportunities.[117] Moreover, courts have resisted an absolute approach to confidentiality for mediation communications. They have found waivers and created exceptions to exclusionary rules that reflect other values.[118] These decisions mean that evidentiary exclusions may actually offer less security for mediation confidentiality than appears on the face of the statute. They also lessen the predictability of evidentiary exclusions as a means to ensure confidentiality.[119]

Through FRE 408, federal law also provides an evidentiary exclusion, not specifically for mediation, but for settlement offers in general.[120]

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[116] For example, Wisconsin makes an exception to its mediation exclusion for evidence of child abuse. WIS. STAT. ANN. § 904.085(4)(d) (West 2000). Nebraska's and South Dakota's evidentiary exclusions do not apply in suits by mediation parties who claim mediator misconduct. NEB. REV. STAT. ANN. § 25-2914 (Michie 1995); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001). There are also exceptions that permit disclosure when communications concern crime or fraud. *See, e.g.*, ARK. CODE ANN. § 16-7-206 (Michie 1999); NEB. REV. STAT. ANN. § 25-2914 (Michie 1995); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001). In addition to specifying exceptions, Wisconsin's exclusion also allows courts to create exceptions when necessary to prevent manifest injustice. WIS. STAT. ANN. § 904.085(4)(e) (West 2000).

[117] *See, e.g.*, CAL. EVID. CODE § 1122 (West Supp. 2001) (permitting disclosure when all mediation participants and mediator expressly agree in writing).

[118] When faced with a comprehensive evidentiary exclusion, a court in a civil juvenile delinquency proceeding permitted evidence of statements made during mediation in order to preserve the juvenile's constitutional right to confrontation. Rinaker v. Superior Court, 74 Cal. Rptr. 464, 466 (Cal. Ct. App. 1998). *See also* Doe v. Nebraska, 971 F. Supp. 1305, 1307–08 (D. Neb. 1997) (interpreting rules to permit evidence of mediation settlement proposals in sanction proceeding regarding failure to authorize representative); Guevara v. Sahoo, No. 05-00-01086-CV, 2001 WL 700517, at *2 (Tex. Ct. App. June 22, 2001) (granting motion for sanctions against attorney based on testimony regarding note delivered in mediation).

[119] *But see* Foxgate Homeowners' Ass'n. v. Bramalea California, Inc., 25 P.3d 1117, 1119 (Cal. 2001) (overruling court-created exception to confidentiality and holding that statute barred submission and consideration of mediator's report and mediation communications in connection with a motion for sanctions for failure to participate in good faith in mediation).

[120] *See supra* note 48.

FRE 408 is referenced in a number of federal courts' mediation rules[121] and, as discussed above, state equivalents may govern mediations under some state law.[122] When states have a specific provision that protects confidentiality in a particular mediation, they treat it as if it displaces FRE 408 entirely for negotiations connected with that mediation. In contrast, one federal court adopted a federal common law privilege to operate in tandem with FRE 408. It created a privilege with a limited temporal scope that applied only to communications made in preparation for and during formal mediation sessions, leaving FRE 408 to govern subsequent negotiations held without the mediator's participation.[123]

FRE 408 and its state enactments are, however, far less protective than the state mediation evidentiary exclusions just discussed. [124] First, by their own terms, they apply only in proceedings subject to state or federal rules of evidence. Consequently, they offer no protection for mediation communications at issue in discovery, most arbitrations, and many administrative proceedings. Second, the protection is also limited in scope: settlement discussions are excluded from evidence only when they are offered to prove or disprove liability or the amount of damages. This leaves many opportunities for admitting evidence of mediation communications, such as when the purpose is to impeach a witness or provide evidence of motive.[125] Third, not all communications in mediation are necessarily covered within the rubric of settling or compromising a claim. Parties in mediation frequently discuss topics that are germane to their relationship as a whole, but may not be related directly to the specific claims raised in the lawsuit they are trying to settle. Under a strict reading of the rule, communications on these ancillary topics are not excluded from evidence, because they are not disputed.[126] As a result of these shortcomings,

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[121] *See, e.g.*, 3d CIR. L. APP. R. 33.5(c); E.D. TENN. L. R. 16.4(h). In contrast, other federal court rules use language similar to that of broader state evidentiary exclusions. *See, e.g.*, 6th CIR. R. 33(c)(4) ("statements and comments . . . shall not be disclosed . . . by counsel in briefs or argument").

[122] *See supra* text accompanying note 49.

[123] *See supra* text accompanying notes 96–100.

[124] *See generally* Jane Michaels, *Rule 408: A Litigation Minefield*, LITIG., Fall 1992, at 34 (discussing the limitations and ambiguities of FRE 408).

[125] *See also In re* Bidwell, 21 P.3d 161, 163 (Or. Ct. App. 2001) (holding Oregon Evidence Code 408 did not bar admission of mediation communications offered in support of request of attorney's fees).

[126] COLE ET AL., *supra* note 5, § 9:05 ("courts have ruled statements outside [FRE 408's] scope if sufficiently unrelated to settlement").

numerous commentators have criticized the protection FRE 408 provides for mediation confidentiality.[127]

A few states have added to the variety in evidentiary exclusions by strengthening their versions of FRE 408 to increase their protection of mediation confidentiality. Maine, for example, has expanded the coverage of its version of FRE 408 so that conduct or statements by a party or mediator in a court-sponsored marital mediation are not admissible for any purpose.[128] This enhancement essentially converts Maine's rule into a comprehensive evidentiary exclusion, similar to those discussed above, for domestic relations mediations. In Indiana, the supreme court interpreted the state's version of FRE 408 to permit the introduction of mediation agreements as evidence only when they are written and signed, thereby strengthening the rule to withstand threats to confidentiality posed by allegations of oral settlements.[129]

In sum, for mediations governed only by FRE 408, there may be no distinction between confidentiality protection in state and federal court. When a federal court recognizes a mediation privilege, however, federal law is then more protective than the state-law default equivalents of FRE 408. Conversely, in states with an evidentiary exclusion or a strengthened state version of FRE 408, there is a potential conflict in a federal court that relies only on the relatively weak protection of FRE 408.

4. *Multiple and Uncertain Legal Frameworks*

A number of jurisdictions rely on more than one of these frameworks to protect mediation confidentiality. First, in states that lack a general mediation statute, confidentiality provisions for specific types of mediations coexist with Rule 408's default provision. This creates a patchwork of coverage by statutes that can vary in the protection they offer.[130] The inconsistency is confusing, and the protection offered by these statutes may be ambiguous.[131]

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[127] *See, e.g., id.* §§ 9:05–9:07; Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations,* 39 HASTINGS L.J. 955, 957–82 (1988); Feinberg, *supra* note 11, at S33–35; Freedman & Prighoff, *supra* note 7, at 40; Harter, *supra* note 11, at 348–56; Kirtley, *supra* note 10, at 12–14; Brown, *supra* note 11, at 313–314; Hoxie, *supra* note 11, at 449–50, 457–59; Kuester, *supra* note 52, at 582–84. There are, however, commentators who contend that FRE 408 provides adequate protection for mediation confidentiality. *See, e.g.*, Ehrhardt, *supra* note 12, at 102–110, 119–126.

[128] ME. R. EVID. 408(b).

[129] Vernon v. Acton, 732 N.E.2d. 805, 810 (Ind. 2000).

[130] *See supra* text accompanying notes 45–50.

[131] For example, the emphasis in many court-annexed mediation programs is on preventing disclosures to the court. This can lead to mediation rules that cannot be

Second, in some states ambiguity stems from the use of multiple legal frameworks within a single general mediation confidentiality statute. One of the most frequent patterns is a combination of either a privilege or evidentiary exclusion with a provision that prohibits mediator testimony,[132] but other combinations are more complex.[133] Furthermore, even states that purport to rely explicitly on one legal construct often contain statutory language that is more consistent with another form of protection,[134] leading to ambiguity in the operation of the statute. When the confusion created by combining multiple protections for confidentiality is compounded by inadequate identification of the legal mechanisms, the reader is left to deduce the classification from the function of the provisions.[135]

The redundancy in state statutes suggests not only that some legislatures regard protection for mediation confidentiality as important and would like to make it ironclad, but also that they are not confident that any one legal form

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identified as any of the possible legal rubrics for protecting the parties' expectations of confidentiality or the mediator's need to maintain confidentiality. *See, e.g.*, UTAH CODE ANN. § 78-31b-8(4) (Supp. 2001) (mediation participants and the neutral in court programs may not disclose and may not be required to disclose mediation communications).

[132] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); ARK. CODE ANN. §16-7-206 (Michie 1999); CAL. EVID. CODE §§ 703.5, 1119–1124, 1152 (West 2001); KAN. STAT. ANN. § 60-452a (Supp. 1999); LA. REV. STAT. ANN. § 9:4112 (West Supp. 2001); MINN. STAT. REV. R. 408; MO. ANN. STAT. § 435.014 (West 1992 & Supp. 2001); NEV. REV. STAT. ANN. 48.109 (Michie 1996); WIS. STAT. ANN. § 904.085 (West 2000).

[133] The Texas alternative dispute resolution statute, for example, contains what appears to be a privilege held by the parties, an evidentiary exclusion, and immunity from service of process. The provision that functions as a privilege is in the subdivision on the neutral's duties: all matters are confidential and not to be disclosed (presumably by the neutral) unless the parties agree otherwise. TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (Vernon Supp. 2001). Additionally, a separate section on the confidentiality of mediation records and communications reads like an evidentiary exclusion, declaring that a communication made by a participant in an ADR procedure "is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding." *Id.* § 154.073(a). Finally, the statute also adds immunity from service of process for testimony that would disclose this confidential ADR information. *Id.* § 154.073(b).

[134] *See, e.g.*, Thompson, *supra* note 10, at 335–37 (arguing that MINN. STAT. ANN. § 595.02(1)(*l*) (West 2000) establishes a mediation privilege even through it is framed in terms of competency).

[135] *See, e.g.*, Haghighi v. Russian-Am. Broad. Co., 945 F. Supp. 1233, 1235 (D. Minn. 1996) (stating "it is unclear whether the [Minnesota] statute creates a privilege or a rule of competency") *rev'd on other grds*, 173 F.3d 1086 (8th Cir. 1999); Daniel R. Conrad, *Confidentiality Protection in Mediation: Methods and Potential Problems in North Dakota*, 74 N.D. L. REV. 45, 56 (1998) (stating it is not clear if N.D. CENT. CODE § 31-04-11 (1996) creates a rule of privilege or of inadmissibility).

can be trusted to provide sufficient protection. Mediation confidentiality may not, however, be a situation where more protection is necessarily better protection. State statutes that do not identify a clear legal framework for mediation confidentiality create a risk that a court will not recognize a familiar construct with known boundaries.

As courts are increasingly called upon to apply state confidentiality provisions, ambiguities in the form of legal protection are likely to lead to increasing mutability of the legal framework. For example, in *Olam v. Congress Mortgage Co.*, a federal magistrate judge characterized California's confidentiality provision as a privilege.[136] Although this provision appears in the state evidence code as an evidentiary exclusion, the statute also contains a mechanism for waiver, which gives it some features of a privilege despite its label.[137] The court interpreted this "privilege" to permit court-made exceptions and fashioned one for claims of duress.[138] By giving judges ambiguous or multiple legal frameworks, lawmakers have increased courts' flexibility and also the uncertainty as to which construct courts will apply.

Moreover, as explored below, in federal court lack of statutory clarity is significant for another reason: the mode of analysis a court uses to determine the applicable confidentiality law in federal court depends on which of the legal frameworks described above provides that confidentiality.[139] This situation is analogous to the process of characterization in choice of law. Jurisdictions typically have different choice-of-law rules depending on whether a suit involves tort, or contract, or property. A court must first describe the doctrinal foundation of a case, and the applicable choice-of-law analysis then flows from this doctrinal characterization. This process has permitted courts to escape rigid rules in settings where more than one characterization is possible.[140] Similarly with confidentiality, a court must first identify the protection at issue as a privilege, evidentiary exclusion, or another type of protection. This label then determines the method for making

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[136] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1120 (N.D. Cal. 1999).

[137] Section 1119 of the California Rules of Evidence makes written or oral communications during mediation inadmissible. CAL. EVID. CODE § 1119 (West Supp. 2001). In addition, however, section 1122, entitled "Communications or writings; conditions to admissibility" permits disclosure when all participants and the neutral arbitrators agree in writing. CAL. EVID. CODE § 1122 (West Supp. 2001). This section thus seems to function as a waiver provision with all the parties and the mediator holding the equivalent of a privilege.

[138] *Olam*, 68 F. Supp. 2d at 1131–32.

[139] *See infra* Part III.C.

[140] *See generally* WEINTRAUB, *supra* note 28, § 3.2.

the choice between federal and state law, but a court may be able to exercise flexibility in applying the label.

5. *Enforcing Mediated Settlements*

Perhaps the most frequent confidentiality issues arise during attempts to enforce mediated settlement agreements.[141] First, the danger of disclosure is inherent in disputes about whether the parties reached an oral agreement. As stated in the commentary to the draft Uniform Mediation Act,

> [t]he disadvantage of exempting oral settlements [from confidentiality protection through a mediation privilege] is that nearly everything said during a mediation session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception [to confidentiality] for oral agreements has the potential to swallow the rule of privilege.[142]

Second, settlement enforcement proceedings raise confidentiality problems when a court is asked to evaluate a claimed contract defense of duress or fraud that would make an agreement unenforceable. These are delicate situations, for precluding this evaluation could undermine the principle of agreement by party consent in mediation.[143] Yet examining a mediation to establish the legitimacy of an agreement in effect negates any prior promise of confidentiality.

State practices differ greatly. Some enforce oral settlements as a matter of general contract law; others have an equivalent to the statute of frauds that requires a writing for settlement agreements.[144] With regard specifically to settlements reached in mediation, state statutes exhibit a full range of variability. A large number establish protections for mediation

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[141] This subject is treated more thoroughly in Ellen E. Deason, *Enforcing Mediated Settlement Agreements: Contract Law Collides With Confidentiality*, 35 U.C. DAVIS L. REV. 33 (2001).

[142] UNIF. MEDIATION ACT § 6(a)(1) reporter's notes (2001).

[143] For discussions of the importance of party consent in mediation, see Nolan-Haley, *supra* note 18; Joseph B. Stulberg, *Fairness and Mediation,* 13 OHIO ST. J. ON DISP. RESOL. 909, 944 (1998) (fairness in mediation requires "the most robust possible conception of party choice and autonomy").

[144] In several states, court rules impose a writing requirement for agreed stipulations filed in court, including agreements to dismiss a settled suit, unless the agreement is made in open court or entered as an order. *See, e.g.*, ALASKA R. CIV. PRO. 81(e); ARIZ. R. CIV. PROC. 80(d); MICH. CT. RULE 2.507(H); NEV. R. DIST. CT. 16; N.Y. C.P.L.R. § 2104 (McKinney 1997); S.C. R. CIV. PROC. 43(k); TEX. R. CIV. PRO. 11; WASH. CIVIL RULE 2A.

communications but are silent on issues concerning settlements.[145] Thus, they appear to reject a confidentiality exception for enforcing or invalidating agreements, but it may be that they have simply overlooked this issue. Others impose a writing requirement for settlement agreements, either linked to an evidentiary restriction such as a privilege[146] or stated as a flat directive.[147] Some limit disclosures to claims that an agreement was obtained by fraud or duress.[148] Others permit disclosures in any proceeding to enforce a settlement.[149] Yet others rely on judicial exceptions made on a case-by-case basis.[150] And whether or not permitted by the applicable statute, courts have made, and will likely continue to make, case-by-case exceptions to

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[145] *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-2238 (West 1994); ARK. CODE ANN. §16-7-206 (Michie 1999); KAN. STAT. ANN. § 60-452a (Supp. 2000); ME. R. EVID. §408; MASS. GEN. LAWS ch. 233, § 23C (2000); MINN. STAT. ANN. § 595.02(1a) (West 2000); MO. ANN. STAT. § 435.014 (West 1992 & Supp. 2001); NEV. REV. STAT. ANN. § 48.109 (Michie 1996); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OKLA. STAT. ANN. tit. 12, § 1805 (West 1993); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (LEXIS Supp. 2001); TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.053(c), 154.073 (Vernon Supp. 2001); UTAH CODE ANN. § 78-31b-8 (1996 & Supp. 2001).

[146] *See, e.g.*, FLA. STAT. ANN. § 44.102(3) (West Supp. 2001); N.C. GEN. STAT. § 7A-38.1(l) (1999); OHIO REV. CODE ANN. § 2317.023 (Anderson 1998); 42 PA. CONS. STAT. ANN. § 5949(b)(1), (c) (West 2000); WASH. REV. CODE ANN. § 5.60.070(1)(e) (West 1995); UNIF. MEDIATION ACT § 6(a)(1) (2001). *See also* Vernon v. Acton, 732 N.E.2d 805, 810 (Ind. 2000) (interpreting evidentiary exclusion of settlement negotiations to include evidence of oral agreements).

[147] *See, e.g.*, FLA. R. CIV. PRO. 1.730; IND. CT. ADR R. 2.7(E)(2); MINN. STAT. ANN. § 572.35 (West 2000); N.C. SUPER. CT. MEDIATED SETTLEMENT CONF. R. 4(C); N.Y. JUDICIARY LAW § 849-b(4)(d) (McKinney 1992); UTAH ADR CT. R. 101(e).

[148] *See, e.g.*, 42 PA. CONS. STAT. ANN. § 5949(b)(3) (West 2000) (limited exception to privilege for evidence of fraudulent mediation communications applies only in proceedings to set aside written agreement on the ground of fraud).

[149] *See, e.g.*, OR. REV. STAT. § 36.222(4) (1999) (establishing exception to mediation privilege for proceedings "to enforce, modify or set aside a mediation agreement"); WYO. STAT. ANN. § 1-43-103 (c)(v) (LEXIS 2001) (no privilege if "one of the parties seeks judicial enforcement of mediation agreement"). Oregon does recognize the threat this exception poses for confidentiality, however, and attempts to mitigate the effects by providing that a court may seal the record when mediation communications are disclosed in proceeding to enforce mediation agreement. OR. REV. STAT. § 36.222(4).

[150] Louisiana, for example, authorizes judges to admit testimony on what transpired during the mediation in order to interpret or enforce an agreement only if the evidence is "necessary to prevent fraud or manifest injustice." *See* LA. REV. STAT. ANN. § 9:4112(B)(1)(c) (West Supp. 2001). Ohio and Wisconsin allow courts to make exceptions to avoid "manifest injustice" that could apply in the context of settlement enforcement. OHIO REV. CODE ANN. § 2317.023(C)(4) (Anderson 1998); WIS. STAT. ANN. § 904.085(4)(e) (West 2000) (exception limited to proceedings other than the dispute that was mediated).

confidentiality to preserve contract defenses that would be unavailable if the confidentiality of mediation communications were strictly maintained.[151]

Federal law on enforcing settlements is very thin, but there is some law associated with settlements of suits brought under federal statutes, especially concerning civil rights and employment,[152] as well as when federal law dominates the landscape.[153] This settlement law did not develop in the context of mediation and tends to be less protective of confidentiality than many state laws designed for mediation. In the Title VII context, for example, courts have established requirements for knowing consent in executing a waiver,[154] but they routinely enforce oral settlement agreements

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[151] *See, e.g.*, Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (making exception to state statutory grant of confidentiality for party's claim that settlement was obtained by duress); Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998) (releasing parties and mediator from confidentiality obligations to evaluate validity of settlement agreement when party alleged mediator coercion); Smith v. Smith, 154 F.R.D. 661, 664 (N.D. Tex. 1994) (considering mediation disclosure on claim of fraud); Randle v. Mid-Gulf, Inc., No. 14-95-01292, 1996 WL 447954, at *2 (Tex. Ct. App. Aug. 8, 1996) (remanding for hearing on duress allegation). For a discussion of the need for individualized balancing in such cases, see Deason, *supra* note 11, at 113; Deason *supra* note 141, at 88–91.

[152] *See, e.g.*, Maynard v. Durham & S. Ry. Co., 365 U.S. 160, 161 (1961) (federal law governs validity of releases under Federal Employers' Liability Act); Morais v. Cent. Beverage Corp. Union Employees' Supplemental Ret. Plan, 167 F.3d 709, 711–12 (1st Cir. 1999) (holding federal common law applies to interpretation of settlement agreement releasing ERISA-based claims; state law preempted by ERISA in context of interpreting employee benefit plans); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) (federal law governs validity of settlement of Title VII actions); Hisel v. Upchurch, 797 F. Supp. 1509, 1518 (D. Ariz. 1992) (applying federal law to validity of release of § 1983 claims); DiMartino v. City of Hartford, 636 F. Supp. 1241, 1249 (D. Conn. 1986) (evaluating validity of settlement under Age Discrimination in Employment Act using federal common law).

[153] *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 734 (1961) (noting "established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law" and refusing to apply New York statute of frauds); Mid-S. Towing Co. v. Har-Win, Inc., 733 F.2d 386, 389 (5th Cir. 1984) (applying federal law to determine validity of settlement agreement of general maritime claims); Thompson v. Cont'l EMSCO Co., 629 F. Supp. 1160, 1163 (S.D. Tex. 1986) (holding federal law governs validity and enforceability of settlement agreement of causes of action raised under general maritime law).

[154] The importance of a knowing waiver of employment discrimination remedies has led courts to look beyond the plain language of a release in circumstances where the employee was not represented by counsel, Coventry v. U.S. Steel Corp., 856 F.2d 514, 524 (3d Cir. 1988); had a limited education, *see* Runyon v. Nat'l Cash Register Corp., 787 F.2d 1039, 1044 (6th Cir. 1986); or had executed a standard release prepared by the employer, Cox v. Allied Chem. Corp., 538 F.2d 1094, 1098 (5th Cir. 1976).

without regard to issues of confidentiality that arise in proving those agreements in court.[155]

In sum, in terms of protections for mediation confidentiality, state law varies along almost any dimension one could choose. Some states lack general mediation statutes entirely; those that have them differ in the legal form used to protect mediation confidentiality, the scope and reach of the statute, and the extent of recognized exceptions. The federal law of mediation confidentiality as expressed in court rules is variable. Otherwise it is largely in an uncertain and nascent condition. Because of this extreme variation, it is obviously important to predict which law may govern a confidentiality dispute arising out of a mediation. The following section explores the problems for predictability raised by the choice-of-law process in federal court.

C. *What Law of Confidentiality Will a Federal Court Apply?*

Mediation confidentiality would make an ideal poster child for the shortcomings of choice-of-law. Problems arise from many sources: the variability in protection for mediation confidentiality, the variability in choice-of-law analyses for mediation confidentiality, and the multiple interests at stake in selecting a role for mediation confidentiality in a particular dispute. Protection for mediation communications in federal court depends on vertical choice-of-law decisions between federal and state law, but the dizzying array of confidentiality protections under state law make horizontal choice of law significant as well. Some states' laws may be more protective than federal law, while others' laws may be less protective. Moreover, this comparison is confounded by the uncertainty of the undeveloped federal confidentiality doctrine. Thus, under current conditions, parties need to anticipate fairly accurately whether a federal court will rely on state or federal law for their dispute and, if state law, which state's law.

The process by which a federal court determines whether state or federal law governs mediation confidentiality is more complex than the usual vertical choice-of-law prediction, because the analysis is itself affected by the type of legal protection at issue. When confidentiality is protected by a privilege or testimonial incapacity, a federal court determines the applicable law using the Federal Rules of Evidence: FRE 501 or FRE 601, respectively. In contrast, if the protection is an evidentiary exclusion, then the *Erie* doctrine provides the choice-of-law analysis. Whatever the form of protection, when the threat to confidentiality arises from the need to validate

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[155] *See, e.g.*, Taylor v. Gordon Flesch Co., 793 F.2d 858, 862 (7th Cir. 1986); *Fulgence*, 662 F.2d at 1209; Wise v. Riley, 106 F. Supp. 2d 35, 39 (D.D.C. 2000).

or invalidate a settlement in an enforcement proceeding, courts may look to the law governing the settlement. Finally, when one of these approaches indicates state law this may introduce additional uncertainties of horizontal choice of law. Both the multiplicity of analytical techniques and the uncertainties of their judicial application contribute to the lack of confidentiality predictability in federal courts.

These multiple choice-of-law analyses each emphasize selected interests in the choice of applicable law, but most are formulaic and do not provide a vehicle for considering the full suite of relevant interests. Nonetheless, their outcomes depend on a large number of unpredictable variables that compound the underlying uncertainty resulting from the vast variations in confidentiality protections. As a consequence, if a dispute has the potential to end up in federal court, under current law it can be virtually impossible for mediation participants to anticipate the extent to which their mediation communications will be protected in the event of further litigation.

1. *Mediation Privilege*

The application of privileges in federal court is governed by FRE 501,[156] which has been described as a rule that "raises more questions than it provides answers."[157] Part of the problem is that parties and courts do not always ask, let alone answer, those questions. It is not unusual for a court faced with privilege issues in mediation simply to assume the applicable law or announce it without adequate analysis.[158] Moreover, attempts to answer the questions FRE 501 raises have fulfilled the Senate Judiciary Committee's

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[156] The rule provides,

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, state, or political subdivision thereof shall be determined in accordance with State law.

FED. R. EVID. 501.

[157] *In re* Combustion, Inc., 161 F.R.D. 51, 53 (W.D. La. 1995), *aff'd*, 161 F.R.D. 54 (W.D. La. 1995).

[158] *See, e.g.*, McEnany v. W. Del. County Cmty. Sch. Dist., 844 F. Supp. 523, 528–30 (N.D. Iowa 1994) (citing federal cases in deciding if settlement agreement was reached in mediation without discussion of applicable law); Hudgins v. Sec. Bank of Whitesboro, 188 B.R. 938, 942–44 (Bankr. E.D. Tex. 1995) (using state law to evaluate mediation settlement agreement without discussion of applicable law).

prediction that the rule would be "pregnant with litigious mischief."[159] The structure of the rule and the intricacies of applying it mean that parties to a mediation are likely to have difficulty predicting the extent to which a privilege will protect their confidentiality. Most of the relevant procedural scenarios—diversity cases, federal cases with pendent claims, and settlement agreement issues—can be illustrated with recent federal decisions on choice of law for mediation confidentiality issues.

There are some relatively simple cases for applying a mediation privilege in federal court: the most straightforward is a simple diversity case with no federal claims when the state-law issue is subject to a mediation privilege under applicable state law. In this situation, the so-called "state law proviso" in FRE 501 gives the federal courts explicit directions to use the state privilege: "in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law."[160] For example, in *Haghighi v. Russian-American Broadcasting Co.*[161] the underlying claim was a state law breach of contract action brought in federal court under diversity jurisdiction.[162] The court held, under the state law proviso of FRE 501, that the state mediation statute provided the applicable privilege for the confidentiality dispute following the mediation of that claim.[163]

In contrast, in evaluating the enforceability of a settlement agreement in another case involving only state-law claims, the court in *FDIC v. White* looked to the federal law of privilege to determine the admissibility of statements made in mediation.[164] This court also stated it was relying on FRE 501 but, without explanation, selected the federal law of privilege.[165] This choice probably reflected the fact that the boundaries of FRE 501's state law proviso do not coincide with the boundaries of diversity jurisdiction.[166]

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[159] S. REP. NO. 93-1277 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059.

[160] FED. R. EVID. 501.

[161] Haghighi v. Russian-Am. Broad. Co., 945 F. Supp. 1233 (D. Minn. 1996), *rev'd on other grounds*, 173 F.3d 1086 (8th Cir. 1999).

[162] *Haghighi*, 173 F.3d at 1086.

[163] *Haghighi*, 945 F. Supp. at 1235 (precluding testimony of mediator on motion to enforce disputed settlement).

[164] FDIC v. White, 76 F. Supp. 2d 736, 737–38 (N.D. Tex. 1999).

[165] *Id.* at 737.

[166] The same is true for the boundaries imposed by the Rules of Decision Act for purposes of the *Erie* analysis. *See* Henry J. Friendly, *In Praise of* Erie—*And the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 408 n.122 (1964) (describing the statement that *Erie* requires application of state law solely in diversity cases as an "oft-encountered heresy").

The source of privilege cannot be determined mechanically by looking to the basis for federal court jurisdiction; instead, the key is the law that supplies the rule of decision for the claim.[167] If a claim or defense is governed by federal law, federal law will also govern the applicable privileges, even in a diversity suit.[168] In the interest of national uniformity, federal common law may govern when the federal government, or its agency, is a party to a suit.[169]

When dealing with a procedural matter, a court's usual approach is to apply familiar forum law to maximize efficiency in the decisionmaking process. Congress, however, recognized the important substantive element in privilege law by using the underlying rule of decision as the determinative criterion in FRE 501. Because a privilege excludes evidence that may be highly probative, it reduces the accuracy of decisions that implement the

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[167] The Senate Judiciary Committee proposed, and the Senate approved, 120 CONG. REC. 36,925 (1974), an amendment that would have determined the applicable law of privilege based on the source of federal court jurisdiction. The goal was to reduce anticipated litigation with "a clearer and more practical guideline." S. REP. NO. 93-1277, at 12 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059. This approach was rejected by the Conference Committee. H.R. CONF. REP. NO. 93-1597, at 7–8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7101.

[168] *See* H.R. CONF. REP. NO. 93-1597, at 7–8 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7098, 7101 ("[S]tate privilege law will usually apply in diversity cases. There may be diversity cases, however, where a claim or defense is based upon federal law. In such instances, federal privilege law will apply to evidence relevant to the federal claim or defense.").

Similarly, in federal question cases, federal courts also match privilege law with the substantive rule of decision, not the source of jurisdiction. They therefore use state-law privileges for cases decided on state-law grounds even if the case is in federal court pursuant to a federal statute. To cite one example, in adversary proceedings brought in bankruptcy cases, federal courts frequently use state-law privileges even though jurisdiction is conferred by the federal Bankruptcy Code. *See, e.g.*, Hudgins v. Sec. Bank of Whitesboro, 188 B.R. 938, 942–44 (Bankr. E.D. Tex. 1995) (using state law in bankruptcy adversary proceeding to determine if agreement was reached in prior mediation); *see also In re* Geothermal Res. Int'l Inc., 93 F.3d 648, 653 n.4 (9th Cir. 1996) (applying state law attorney-client privilege to state claim of breach of fiduciary duty adjudicated in bankruptcy); *In re* Megan-Racine Assoc., Inc., 189 B.R. 562, 569 (Bankr. N.D.N.Y. 1995) (applying state privilege law in adversary proceeding dealing with state law issues); *In re* Tidewater Group, Inc., 65 B.R. 179, 181–82 (Bankr. N.D. Ga. 1986) (applying state privilege law in adversary proceeding grounded in state-law claims for breach of contract and fraud; distinguishing applicable privilege law when proceeding involves questions of bankruptcy law).

[169] *See, e.g.*, FDIC v. Oldenburg, 34 F.3d 1529, 1538 (10th Cir. 1994) (noting suits brought by the FDIC are governed by federal law). *But see* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85–86 (1994) (holding federal interest not at stake when FDIC not asserting its rights but the rights of member bank).

substantive law at issue. Enacting or creating a privilege thus represents a policy choice to elevate the confidentiality of certain communications over the importance of the norms expressed in the jurisdiction's substantive rule.[170] This recognition of a substantive purpose for privileges was at the direct behest of Congress, which rejected the version of the privilege rules proposed by the Supreme Court and made changes designed to avoid overriding state substantive rules.[171]

While this incorporation of the substantive role of privilege into the federal choice-of-law rule was a step forward, FRE 501's dispositive emphasis on the source of the rule of decision means that it recognizes only a single policy interest: the extent to which excluding certain evidence will affect the enforcement of the norms expressed in the underlying substantive law.[172] When the underlying law is federal, FRE 501 directs federal courts to the balance of competing values embodied in the federal privilege. When it is state, FRE 501 directs federal courts to the balance expressed in the state's privilege. Therefore the jurisdiction that provides the norms expressed in the underlying substantive law also determines the competing values that will be recognized in the form of privileges. This one-dimensional formulation in FRE 501 can be both under- and over-inclusive. It ignores the potentially conflicting values that may be important to other jurisdictions involved in the settlement process—as the host for the mediation, the forum for the initial suit, or the forum for the confidentiality dispute—in seeing their confidentiality law applied.[173] It emphasizes underlying law that is no longer relevant if the case has settled and the parties have agreed on private norms.[174] Moreover, even with its one-dimensional criterion, FRE 501 does little to promote predictability. Courts have often reached contradictory conclusions in categorizing rules of decision as federal or state, thus perpetuating uncertainty in the rule's most fundamental distinction.[175]

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[170] *See* Dudley, *supra* note 25, at 1801–03, 1807–10.

[171] *See, e.g.*, Olin Guy Wellborn III, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 TEX. L. REV. 371, 401 (1977); Margaret A. Berger, *Privileges, Presumptions and Competency of Witnesses in Federal Court: A Federal Choice-of-Laws Rule*, 42 BROOK. L. REV. 417, 439 (1976).

[172] *See* Dudley, *supra* note 25, at 1803.

[173] *See* discussion *supra* Part II.

[174] *See supra* text accompanying note 32.

[175] One particularly thorny area involves claims against the government under the Federal Tort Claims Act (FTCA). Because the Act designates the use of state tort law to determine liability, 28 U.S.C. § 1346(b)(1) (Supp. V 1999), many courts reason that state law provides the rule of decision and the privilege, in spite of the jurisdiction conferred by federal statute. *See, e.g.*, Ellis v. United States, 922 F. Supp. 539, 540 (D. Utah 1996); Huzjak v. United States, 118 F.R.D. 61, 63 (N.D. Ohio 1987). In other forums, courts

The analysis is even less satisfying when state-law claims are joined with a federal question and brought in federal court under supplemental jurisdiction. In *Folb v. Motion Picture Industry Pension & Health Plans*,[176] a federal question based on the Employee Retirement Income Security Act of 1974 (ERISA)[177] was removed to federal court along with pendent state claims.[178] The suit was brought by a fired employee who alleged that he had been illegally discharged in retaliation for whistle blowing.[179] His employer, the Plans, maintained that plaintiff's termination was justified because he had sexually harassed another employee.[180] The plaintiff sought discovery relating to a prior mediation between the Plans and the employee who claimed the plaintiff had harassed her, arguing that this mediation information would show that the Plans had maintained there had been no harassment.[181] FRE 501 is silent as to the appropriate source of privilege for cases like this with claims based on both federal and state law. Courts have filled this interstice with a "general rule [that] 'in federal question cases where pendent state claims are raised the federal common law of privileges should govern all claims of privilege raised in the litigation.'"[182] Applying

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have reasoned that state law is adopted as federal common law under the FTCA, so the FRE 501 state law proviso does not apply and federal common law should supply any privilege. *See, e.g.*, Galarza v. United States, 179 F.R.D. 291, 293 (S.D. Cal. 1998); Young v. United States, 149 F.R.D. 199, 201–04 (S.D. Cal. 1993). *See also* Syposs v. United States, 179 F.R.D. 406, 409 (W.D.N.Y. 1998) (ignoring rule of decision analysis and concluding that state privilege was inapplicable in FTCA suit because of federal question jurisdiction), *adhered to on reconsideration*, 63 F. Supp. 2d 301 (W.D.N.Y. 1999).

[176] Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000).

[177] Employee Retirement Income Security Act, Pub. L. No. 93-406 (codified as amended in scattered sections of 29 U.S.C.).

[178] *See Folb*, 16 F. Supp. 2d at 1167.

[179] *Id.* at 1166.

[180] *See id.* at 1167.

[181] *Id.*

[182] Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc., 35 F. Supp. 2d 582, 589 n.14 (N.D. Ohio 1999) (quoting Hancock v. Dodson, 958 F.2d 1367, 1372 (6th Cir. 1992)). *See also* Pearson v. Miller, 211 F.3d 57, 65–66 (3d Cir. 2000); Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992); Hancock v. Hobbs, 967 F.2d 462, 466–67 (11th Cir. 1992); von Bulow v. von Bulow, 811 F.2d 136, 141 (2d Cir. 1987); Wm. T. Thompson Co. v. Gen. Nutrition Corp., 671 F.2d 100, 104 (3d Cir. 1982); Mem'l Hosp. v. Shadur, 664 F.2d 1058, 1061, 1061 n.3 (7th Cir. 1981).

The mere presence of a federal claim, however, does not seem to be enough to bring a case under this rule. *See, e.g.*, Platypus Wear, Inc., v. K.D. Co., 905 F. Supp. 808, 811 (S.D. Cal. 1995) (applying state privilege to state claims in spite of federal counterclaim); *see also* Scott v. McDonald, 70 F.R.D. 568 (N.D. Ga. 1976) (applying state privilege to

this "general rule," the *Folb* court ruled that privilege was governed by federal common law and proceeded to outline a federal mediation privilege that partially blocked discovery of the mediation.[183]

The "general rule" is in tension with a literal reading of FRE 501, which implies that courts will apply the federal common law of privilege to the federal claims and the state law of privilege to the state claims. But when federal and state privileges are at odds, a claim-by-claim approach could require a court to admit evidence for a federal claim while excluding the same evidence as privileged for a pendent state claim. Many federal courts regard this result as unworkable and so have adopted the general rule favoring federal privilege law for practical reasons, concluding that "it would be meaningless to hold the communication privileged for one set of claims but not for the other."[184] Other courts have reached the same result by relying on a statement in the Senate report on FRE 501 that "[i]t is also intended that the Federal law of privileges should be applied with respect to pendant State law claims when they arise in a Federal question case."[185] This reasoning has been criticized, however, because the comment was made in support of the Senate's version of FRE 501, which was rejected in conference.[186] Yet

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diversity negligence claim in spite of allegations that violation of federal statutes established negligence). Nor does the initial composition of the case control the analysis. *See, e.g.*, Anas v. Blecker, 141 F.R.D. 530, 531 (M.D. Fla. 1992) (applying state law to privilege issues after federal securities claims dismissed leaving only pendent state claims).

[183] *Folb*, 16 F. Supp. 2d at 1169–80. *See supra* text accompanying notes 96–100.

[184] Perrignon v. Bergen Brunswig Corp., 77 F.R.D. 455, 458 (N.D. Cal. 1978). *See also* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 501.02[2][c] (Joseph M. McLaughlin ed., 2d ed. 2001) ("[P]ermitting evidence inadmissible for one purpose to be admitted for another purpose defeats the purpose of a privilege. The moment privileged information is divulged the point of having the privilege is lost."). The same rationale applies when diversity of citizenship and the presence of a federal claim provide a dual basis for federal court jurisdiction. *See, e.g.*, *von Bulow*, 811 F.2d at 141; Smith v. Alice Peck Day Mem'l Hosp., 148 F.R.D. 51, 53 (D.N.H. 1993).

One court suggested the alternative of trying the state claim separately in order to avoid undermining either rule. *See* Research Inst. for Med. & Chemistry, Inc. v. Wis. Alumni Research Found., 114 F.R.D. 672, 675 n.2 (W.D. Wis. 1987). I have found no published cases in which courts have done this.

[185] S. REP. NO. 93-1277, *reprinted in* 1974 U.S.C.C.A.N. 7051, 7059 n.16. *See, e.g.*, *von Bulow*, 811 F.2d at 141 (2d Cir. 1987); Sabree v. United Bhd. of Carpenters & Joiners of Am., Local No. 33, 126 F.R.D. 422, 424 (D. Mass. 1989); Pinkard v. Johnson, 118 F.R.D. 517, 520 (M.D. Ala. 1987).

[186] *See, e.g.*, Hansen v. Allen Mem'l Hosp., 141 F.R.D. 115, 120–21 (S.D. Iowa 1992) (suggesting that the legislative history of FRE 501 cannot resolve the problem of "conflicting federal and state privilege law in the context of pendent state-law claims");

another rationale for the "general rule" is that federal policy favors admissibility of evidence, and state laws are likely to confer more generous privilege protection.[187] All of these rationales are unsatisfactory, but FRE 501's single criterion precludes considering other factors that could potentially resolve the conflict.

There are courts that espouse a piecemeal approach under FRE 501. The Tenth Circuit decided to look to state law in deciding privilege questions for state causes of action, even when they accompany federal claims,[188] although it has not faced a case with conflicting privileges and evidence relating to both claims. Other courts use a claim-by-claim approach selectively. When the evidence claimed to be privileged in a mixed-claim case is relevant only to pendent state-law claims, they use the state law of privilege for the state claims.[189] This approach makes sense from the perspective of interest

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Perrignon, 77 F.R.D. at 458–59 (stating that "the Senate Judiciary Committee's statement provides no evidence of congressional intent with respect to FRE 501 as it was ultimately enacted").

[187] *See, e.g.*, FDIC v. Mercantile Nat'l Bank of Chi., 84 F.R.D. 345, 349 (N.D. Ill. 1979). Again, the Senate Report provides the only indication that Congress supported this rationale:

> If the rule proposed here results in two conflicting bodies of privilege law applying to the same piece of evidence in the same case, it is contemplated that the rule favoring reception of the evidence should be applied. This policy is based upon the present rule 43(a) of the Federal Rules of Civil Procedure which provides: In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made.

S. REP. NO. 93-1277.

[188] *See, e.g.*, Motley v. Marathon Oil Co., 71 F.3d 1547, 1551 (10th Cir. 1995).

[189] *See, e.g.*, Freeman v. Fairman, 917 F. Supp. 586, 588 (N.D. Ill. 1996) (applying state privilege to evidence that was relevant only to pendent state claim); Evanko v. Elec. Sys. Assoc., Inc., No. 91 Civ. 2851, 1993 WL 14458, at *1 (S.D.N.Y. Jan. 8, 1993) (holding that discovery of medical records relevant only to pendent state claim of emotional distress is governed by state physician-patient privilege); Shaklee Corp. v. Gunnell, 110 F.R.D. 190, 192 (N.D. Cal. 1986) (applying state law of privilege when state and federal claims are joined but evidence affects only state claims); *see also* Waterloov Gutter Prot. Sys. Co. v. Absolute Gutter Prot., L.L.C., 64 F. Supp. 2d 398, 411–15 (D.N.J. 1999) (applying state privilege to state-law counterclaim in patent infringement suit).

Unfortunately for the goal of predictability, other courts have explicitly rejected this selective approach based on relevance. *See, e.g.*, United States v. Keystone Sanitation Co., 899 F. Supp. 206, 208 (M.D. Pa. 1995) (order on reconsideration) (stating in dicta that even if accountant privilege were relevant only to the pendent state claim, federal law of privilege would govern); Doe v. Special Investigations Agency, Inc., 779 F. Supp. 21 (E.D. Pa. 1991) (applying principles of federal privilege in case with federal and state claims even though evidence sought was relevant only to the pendent state-law claim);

analysis in that the policies expressed in the substantive law of the federal forum are not at issue. Unfortunately, the implications of an interest analysis are truncated at this point, because even a selective approach to FRE 501 is limited to its framework and cannot take into consideration the federal interests that can arise in relation to the federal court's role as host for the mediation or as the forum for the underlying or subsequent disputes.

Olam v. Congress Mortgage Co.[190] illustrates a variant of the claim-by-claim piecemeal approach to choice of law in the mediation setting. Like *Folb*, the case involved a mixture of federal and pendent state claims[191] but, unlike *Folb*, the court assessed mediation confidentiality under California state law rather than within the federal framework.[192] The *Olam* court was faced with a motion to enforce a settlement memorandum of understanding reached through its mediation program.[193] It defined the relevant "claim" as a state-law cause of action to enforce a settlement agreement,[194] thus separating this mediation-related claim from the mixed federal and state composition of the underlying suit. The court then held that the state-law proviso of FRE 501 applied to this separate claim, so state law provided the privilege for information about the mediation and the disputed agreement.[195] Using the state-law privilege in this situation did not lead to inconsistent treatment of the federal claims because the privileged information was irrelevant to those particular claims.[196]

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see also PPM Am., Inc. v. Marriott Corp., 152 F.R.D. 32, 34 (S.D.N.Y. 1993) (applying federal law to privilege claim for evidence relevant to state-law counterclaim when plaintiffs' claims were predicated on both federal and state-law claims).

[190] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999).

[191] Federal court jurisdiction was premised on claims under the federal Truth in Lending Act with supplemental jurisdiction over state claims for fraud and breach of fiduciary duty. *Id.* at 1115.

[192] *Id.* at 1119.

[193] *Id.* at 1116–18.

[194] *Id.* at 1119.

[195] *Id.* at 1121. The court delineated an exception to the state-law confidentiality protections, *id.* at 1131–39, and heard under seal the mediator's testimony on the objecting party's claim of undue pressure to sign the agreement. *Id.* at 1145–50. Ultimately the court unsealed the testimony to support its conclusion that the objection had no merit and the settlement should be enforced. *Id.* at 1139, 1151.

[196] A claim-by-claim approach to choice of law has also been rejected, in dicta, in the mediation context. In *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994), the plaintiff alleged that a settlement to which he had consented in a prior state court mediation was procured by fraud, and the defendants sought to subpoena the mediator to testify about the mediation. Federal court jurisdiction was premised on federal securities laws and the Racketeer Influenced and Corrupt Organizations Act, with supplemental state claims of fraud. *Id.* at 664. The court stated that even if an issue of mediator privilege arose only in

The *Folb* case illustrates the difficulties that FRE 501's exclusive reliance on the rule of decision creates for predicting confidentiality protection. In *Folb*, events in a subsequent lawsuit completely unrelated to the private mediation determined the confidentiality of the mediation—had the court not concluded that ERISA preempted one state claim and refused to remand plaintiff's state claims for wrongful termination, the requested discovery would have taken place in state court subject to California mediation protections instead of federal common law. This may seem arbitrary. Because it seeks to further the substantive interests of the jurisdiction that supplies the rule of decision, FRE 501 provides no functional way to resolve the conflict between state and federal law when they both supply substantive rules of decision in a case.

The *Olam* case demonstrates a way to avoid this conflict by redefining the relevant claim if the issue is settlement enforcement. The circumstances of this case also illustrate, however, that expanding the analysis beyond consideration of the underlying causes of action may only reveal other conflicts. The state and federal interests in the underlying claims that form the basis for the FRE 501 calculus were not relevant, because the parties had (allegedly) settled them. The state, however, had an interest in its policies relating to settlement validity that were embodied in state contract and privilege law.[197] Under the *Olam* court's application of FRE 501, this was the interest it relied on to select state privilege law. But if it had expanded its analysis to include other criteria, the court would have discovered conflicting federal interests. The federal court served as the host of the mediation, the forum for the initial dispute, and the forum for the subsequent dispute, implicating multiple federal interests in the success of the mediation and the effects of enforcing or invalidating the settlement agreement.

The *Olam* case also demonstrates the uncertainty associated with confidentiality in a federal court mediation program. The parties conducted their mediation in the Northern District of California's program, with a court-provided mediator, subject to the program's rules. But because the court viewed the claim for enforcement of the alleged agreement as a matter of state law, it held that the court rules governing the mediation did not

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the context of a state-law claim brought under the court's supplemental jurisdiction, the federal law of privilege would "supersede[ ] any contrary state law." *Id.* at 671. After discussing the pros and cons of a federal mediation privilege, *id.* at 670–75, the court resorted to state law, apparently adopting it as federal common law, because the parties had assumed that Texas law and the state court mediation rules would govern confidentiality. *Id.* at 666–70.

[197] Arguably, there was no competing federal interest in settlement validity in that no federal standards have been articulated for settlements of actions under the Truth in Lending Act at issue in *Olam*.

apply.[198] California has a mediation statute and it is not clear how, or if, the source of confidentiality law affected the outcome in the case. In other cases with weak state law, however, choice of law could be crucial:

> [E]ven when a local rule adopted by a federal district court . . . offers more protection to mediation communications than would be offered by the law of the state where the district court sits, the federal court must apply state privilege law when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is relevant.[199]

These cases and their varying outcomes indicate that a party must forecast multiple factors in order to predict whether state or federal privilege law will apply. Additionally, they reveal that the choice-of-law analysis for mediation privileges can be mechanical and arbitrary when it does not reflect all of the relevant considerations at stake in balancing confidentiality and disclosure for mediation communications. Expanding the relevant considerations might make the analysis more meaningful, but is not likely to improve predictability.

2. *Restriction on Mediator Testimony*

The applicable rule of testimonial capacity in federal courts is also controlled by a federal rule of evidence—in this case FRE 601.[200] The rule declares that all witnesses are competent to testify in federal court unless state law provides the rule of decision and makes the witness incompetent. FRE 601's abbreviated state law proviso recognizes the same substantive interests as those acknowledged by FRE 501's proviso. The rule can be interpreted in tandem with FRE 501 to some extent, and it is characterized by limitations and ambiguities very similar to those that plague FRE 501.[201]

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[198] *Olam*, 68 F. Supp. 2d at 1121–25.

[199] *Id.* at 1125.

[200] FRE 601 provides,

> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

FED. R. EVID. 601.

[201] It also carries a history similar to that of FRE 501. The original Judicial Conference proposal to eliminate entirely all competency requirements and grounds for disqualification, except as provided elsewhere in the Federal Rules of Evidence, was

As with the federal privilege proviso, the boundaries of the state law incapacity proviso are formed by the source of the rule of decision, not the source of federal court jurisdiction, with all the interpretive difficulties that attend that analysis.[202] Also, like FRE 501, FRE 601 does not specify the applicable law for mixed federal and state claims. Read literally, the rule would permit a witness to testify on some, but not all, related claims. For example, in a case joining federal antitrust and state unfair competition claims, if a witness were disqualified under state law, he would be competent to testify only on the federal antitrust claim even though his testimony would be equally relevant to both claims. Unlike FRE 501, however, no general rule has developed for FRE 601 in the context of pendent claims, probably because there are so few federal court cases concerning witness competency.[203]

When a state uses disqualification of the mediator as a witness to protect mediation confidentiality, the question whether that law will be applied in a particular case is subject to all the uncertainties explored in the context of privilege. This uncertainty only increases with state statutes that make a mediator immune to service of process rather than declaring her incompetent to testify. It is then no longer clear that FRE 601 supplies the appropriate analysis in federal court. It may be that applicable law should instead be determined using an *Erie* analysis, as with the evidentiary exclusions discussed in the next section.

3. *Evidentiary Exclusion*

When the confidentiality provision at issue is an evidentiary exclusion or a state version of FRE 408, the *Erie* doctrine[204] and its progeny determine applicable law. While the original *Erie* analysis relies on the rule of decision,

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rejected because it failed to recognize state interests in the competency of witnesses. *See* WRIGHT & GOLD, *supra* note 110, § 6001, at 4–5.

[202] *See supra* text accompanying notes 166–69.

[203] In the mediation context, state statutes that declare mediators incompetent to testify have been analyzed in federal court under the rubric of privilege. *See* Haghighi v. Russian-Am. Broad. Co., 945 F. Supp. 1233, 1235 (D. Minn. 1996), *rev'd on other grounds,* 173 F.3d 1086 (8th Cir. 1999); Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999). For a discussion of the various approaches courts could take in applying FRE 601 to a case with pendent state claims, none of them entirely satisfactory, see WRIGHT & GOLD, *supra* note 110, § 6009, at 80–93.

[204] In *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), the Supreme Court held that Congress had no power to create substantive rules of common law to govern in a state. Therefore, federal courts exercising diversity jurisdiction must apply state substantive law—both decisional and statutory—to adjudicate state-created rights.

also adopted as the criterion in FRE 501 and FRE 601, *Hanna v. Plumer*[205] established a special *Erie* analysis for federal procedural rules: the federal rule preempts conflicting state procedures unless a court determines that it is unconstitutional or beyond the scope of the rulemaking power Congress delegated to the Supreme Court.[206] The Federal Rules of Evidence share this special status in the world of *Erie* and, as a set of procedural rules passed by Congress, are regarded as presumptively constitutional. This means that when a court determines choice of law between state and federal exclusionary rules, the standard, and perhaps consequently the result, differ from that for a privilege or testimonial incapacity.

The relevant federal exclusionary rule for settlement processes in general is FRE 408.[207] In states that have adopted the rule without change, there is no vertical conflict in federal court. But FRE 408 is a narrower exclusion than the state equivalents with strengthened mediation coverage, as in Maine and Indiana.[208] In these states, a federal court using the *Hanna* analysis would be expected to find a conflict and apply the federal rule to admit the evidence in circumstances when the state's restrictions on mediation evidence cannot be applied simultaneously with the federal rule's limited exclusion of evidence.[209] Similarly, a federal court could find a conflict between FRE 408

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[205] Hanna v. Plumer, 380 U.S. 460 (1965).

[206] 380 U.S. 460, 469–73 (1965) (resolving conflict between a state service of process rule and Rule 4 of the Federal Rules of Civil Procedure (FRCP)). The Court acknowledged "the long-recognized power of Congress to prescribe housekeeping rules for federal courts even though some of those rules will inevitably differ from comparable state rules." *Id.* at 473.

[207] *See supra* note 48 and accompanying text.

[208] *See supra* text accompanying notes 128–29.

[209] There is, to be sure, uncertainty in the concept of "conflict" between state and federal evidentiary principles depending on the sphere of coverage assigned to a rule. *Compare* Walker v. Armco Steel Corp., 446 U.S. 740, 750–51 (1980) (interpreting narrowly FRCP 3's provision that a case starts with filing the complaint and finding no conflict with a state statute that requires service of process to toll the statute of limitations), *with Hanna*, 380 U.S. at 470 (finding conflict between FRCP 4's service requirements and state requirements for service on the executor of a deceased).

If a court is willing to define its sphere of coverage broadly enough, the Federal Rules of Evidence could be interpreted to cover all potential evidence in federal court and thus preempt any state rule of evidence. Wright and Miller suggest that FRE 402's provision that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules proscribed by the Supreme Court pursuant to statutory authority" can be read as a congressional instruction to admit all evidence not excluded by particular authorities. Because "state statutes and rules" are not listed among those authorities, a court could conclude that therefore state evidentiary rules, however substantive, should give way in diversity cases to FRE 402. *See* 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE

and a state-law evidentiary exclusion that governs mediation.[210] A categorical state evidentiary exclusion for mediation is narrower than FRE 408, in that it governs only mediation. But this exclusion is also broader, in that evidence is excluded without regard to the purpose for which it is proffered. A state evidentiary exclusion will thus overlap in coverage with the federal rule to the extent the mediation is a settlement proceeding and contradict it, creating a conflict, to the extent the evidence is offered for a purpose other than proving liability or damages.[211]

Thus, for states that have enacted an evidentiary exclusion stronger than FRE 408, the *Hanna* analysis seems likely to lead to an application of the federal rule. This would result in a lack of vertical uniformity and some of the forum shopping and fairness problems that the traditional *Erie* analysis was designed to avoid. For instance, a mediation participant in a state with a strengthened version of Rule 408 or an evidentiary exclusion for mediation who wants to introduce mediation communications in court would be well advised to file the case in (or remove it to) a federal court, which would apply the more limited protection of FRE 408 as a result of *Hanna* preemption.[212] The broader consequence for mediation is that, absent a crystal ball to foresee which court—state or federal—they would be in should a dispute arise, mediation participants will be uncertain about the extent to which an evidentiary exclusion will protect their confidentiality.

Some federal courts have, moreover, introduced additional uncertainty by relying on an examination of substance and procedure, an approach that

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AND PROCEDURE § 4512 (2d ed. 1996). Federal courts that have considered the issue explicitly have rejected the argument that FRE 401 and 402 control admissibility in the face of a substantive state exclusionary rule. *See, e.g.*, Hottle v. Beech Aircraft Corp., 47 F.3d 106, 110 (4th Cir. 1995); Potts v. Benjamin, 882 F.2d 1320, 1324 (8th Cir. 1989); Morton v. Brockman, 184 F.R.D. 211, 216 (D. Me. 1999) (evidence of nonuse of seatbelts "unlikely" to be admissible under Rules 401–402). Recently, however, courts have tried to separate the substantive and evidentiary aspects of such state rules. *See, e.g.*, Fitzgerald v. Expressway Sewerage Constr., Inc., 177 F.3d 71, 74 (1st Cir. 1999) (deciding that state collateral source rule is a substantive rule of damages but its evidentiary implications are governed by the Federal Rules of Evidence, especially FRE 401, 402 & 403).

[210] *See supra* text accompanying notes 114–15.

[211] In adopting a mediation privilege, *Folb v. Motion Picture Industry Pension & Health Plans* avoided this conflict by preserving a role for FRE 408 with a temporal definition of mediation. The court held that FRE 408, rather than a mediation privilege, applies after the conclusion of the formal mediation session. *Folb*, 16 F. Supp. 2d 1164, 1171 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000). *See supra* text accompanying notes 96–100.

[212] A participant with similar desires who cannot meet the requirements of diversity jurisdiction would be restricted by the more stringent state confidentiality protections in state court and would undoubtedly see this as an inequitable administration of the law.

reverts to Rules Decision Act analysis and thus seems at odds with *Hanna* preemption. State-law evidentiary rules were traditionally characterized as procedural,[213] which would dictate the use of forum law under a Rules Decision Act approach. But often exclusion or admission of evidence is an expression of a substantive state policy to encourage beneficial behavior outside litigation (such as post-accident remedial measures).[214] Such evidentiary rules create a doctrinal conundrum, because "[c]ertain matters do not fall neatly into the substantive/procedural dichotomy, but rather fall within a twilight zone between both classifications."[215] In a diversity case with a state evidentiary rule in this "twilight zone," many federal courts are inclined to emphasize the state's substantive policy goals and may not explicitly analyze conflicts with the federal rules. A typical approach is to ask whether or not the admissibility of evidence is "so intertwined with a state substantive rule that the state rule [should be] followed in order to give full effect to the state's substantive policy."[216] This analysis has led a number of federal courts to apply "substantive" state evidentiary law to determine the admissibility of certain evidence in diversity cases.[217]

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[213] *See, e.g.*, EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 12.10 (3d ed. 2000).

[214] *See supra* text accompanying notes 114–15. *See generally* 19 WRIGHT ET AL., *supra* note 209, § 4512, at 422. The status of the Federal Rules of Evidence as substantive or procedural was debated during their formulation because the authority to promulgate rules under the Rules Enabling Act reaches only to procedural provisions. This concern became moot when Congress adopted the evidence rules directly as federal legislation. *See* Dudley, *supra* note 25, at 1781 n.4.

[215] Carota v. Johns Manville Corp., 893 F.2d 448, 450 (1st Cir. 1990). Categorizing issues as substantive or procedural is so fraught with difficulty that much of the evolution of the *Erie* doctrine has been an attempt to find more workable alternatives by reformulating the analysis in terms of whether or not the rule is outcome-determinative or asking how it affects the twin aims of *Erie*. *Cf.* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996) ("Classification of a law as 'substantive' or 'procedural' for *Erie* purposes is sometimes a challenging endeavor.").

[216] 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2405, at 543 (2d ed. 1996) (citation omitted). *See also* 19 WRIGHT ET AL. *supra* note 209, at 422 (some state laws of evidence "in fact serve substantive state policies and are characterized more properly as rules of substantive law within the meaning of the *Erie* doctrine").

[217] The Wright, Miller, and Cooper treatise categorizes "the parole evidence rules," the Statutes of Frauds, the agency law principle that the authority of an agent cannot be proved by his own statements, and rules regarding the admissibility of prejudicial evidence as "substantive" evidentiary rules that are enforced in federal courts. 19 WRIGHT ET AL., *supra* note 209, § 4512, at 422–24 (citations omitted).

Many federal courts also regard state policies on the admissibility of collateral source payments of medical expenses as "substantive" and have held that they should apply in diversity cases. *See, e.g.*, Lomax v. Nationwide Mutual Ins. Co., 964 F.2d 1343,

For mediation evidence, a general state law exclusion is a procedural technique in that it relates to the process of litigation. The goals often voiced for encouraging it—saving litigation costs or reducing caseloads—can also be characterized as procedural in a broad sense. In a "twilight zone" analysis, this reasoning would favor the applicability of FRE 408 in a federal diversity case rather than a state evidentiary exclusion. However, one can also argue that a mediation exclusion reflects the state's substantive policy choice to encourage mediation, and hence settlement, by ensuring confidentiality for

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1345 (3d Cir. 1992) (applying Delaware's collateral source rule as substantive state law); *In re* Air Crash Disaster Near Chicago, 803 F.2d 304, 307–308 (7th Cir. 1986) (applying collateral source rule of Arizona, whose substantive law governed the case); Mitchell v. Hayes, 72 F. Supp. 2d 635, 636–37 (W.D. Va. 1999) (deciding that while the collateral source doctrine is an evidentiary rule, it is "closely tied to state substantive policy," so the state rule governs).

As another example, federal courts typically apply state law rules that deny admissibility of evidence that seatbelts were not in use during an accident. This rule reflects a state substantive policy judgment that failure to use seatbelts should not result in civil liability or a decrease in damages. *See, e.g.*, Gardner v. Chrysler Corp., 89 F.3d 729, 736–37 (10th Cir. 1996); Dillinger v. Caterpillar, Inc., 959 F.2d 430, 437–38 (3d Cir. 1992); Potts v. Benjamin, 882 F.2d 1320, 1324 (8th Cir. 1989); Morton v. Brockman, 184 F.R.D. 211, 215 (D. Me. 1999). *See also* Sours v. General Motors Corp., 717 F.2d 1511, 1519–21 (6th Cir. 1983) (applying Ohio seatbelt law without discussion of whether substantive or procedural).

Some courts have looked to the substance of state evidentiary rules even when a federal rule is directly on point and thus a conflict is clear. For example, FRE 407 prohibits admission of evidence of post-injury remedial measures for purposes of proving culpable conduct, yet many state courts have determined that the policy reasons for excluding this evidence apply only to negligence cases, and hence do not permit this exclusion in strict products liability cases. *See, e.g.*, Forma Scientific, Inc. v. Biosera, Inc., 960 P.2d 108, 115–17 (Colo. 1998). The federal courts of appeals are split on whether to use FRE 407 or these state evidentiary rules in diversity actions. *Compare* Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 931–33 (10th Cir. 1984) (holding that state rule controls in the event of a conflict with FRE 407, which is based primarily on policy considerations that are closely tied to state products liability law), *with* Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 17–18 (1st 1994) (deciding that FRE 407 addresses procedural matters and so applies in diversity cases), Kelly v. Crown Equip. Co., 970 F.2d 1273, 1277–78 (3d Cir. 1992) (holding that FRE 407 is "arguably procedural" and therefore governs in spite of Pennsylvania law to the contrary), *and* Flaminio v. Honda Motor Co. Ltd., 733 F.2d 463, 471–72 (7th Cir. 1984) (stating that substantive judgment of FRE 407 is "entwined with procedural considerations"). In 1997, FRE 407 was amended to clarify that it is applicable to strict liability actions but the Tenth Circuit has not revisited the issue of applicable law since the amendment. *See Forma Scientific*, 960 P.2d at 115 n.12 (predicting the Tenth Circuit would continue to apply state evidentiary law in diversity cases). *See generally* Dudley, *supra* note 25, at 1810 n.148 (exploring state and federal interests and suggesting amendment of FRE 407 to incorporate deference to conflicting state rules in state law cases).

the process. This reasoning recognizes a state's interest in applying the balance it has chosen between the values of maintaining confidentiality and disclosing communications when a mediation takes place in the state or under state auspices. Moreover, the rules for admissibility of mediation communications can be analogized to state rules governing admissibility of evidence from compulsory arbitration or from mediation programs in medical malpractice suits, which are, for the most part, deemed substantive and applied in federal court.[218]

There is some precedent for displacing FRE 408 using this approach to the *Erie* analysis. The First Circuit took this path in the context of a state "jury rule," which makes evidence of an out-of-court settlement with absent defendants admissible for a jury to consider in determining its damage award.[219] The court held that damages are a substantive issue and that the Massachusetts jury rule was in direct conflict with FRE 408.[220] While *Hanna* would suggest that FRE 408 preempts the jury rule because of this conflict, the court refused to "contravene" substantive state law in a diversity action and held the settlement evidence admissible under state law.[221] Thus, in any state that strengthens its version of FRE 408 or enacts an exclusionary rule to protect mediation confidentiality, this line of *Erie* analysis creates doubt about whether a federal court would find preemption and apply the federal

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[218] *See, e.g.*, Wray v. Gregory, 61 F.3d 1414, 1417 (9th Cir. 1995) (applying state admissibility rules for findings of medical screening panel); Daigle v. Me. Med. Ctr., Inc., 14 F.3d 684, 689 (1st Cir. 1994) (applying state admissibility rules for findings of medical screening panel); DiAntonio v. Northampton-Accomack Mem'l Hosp., 628 F.2d 287, 289–90 (4th Cir. 1980); *see also* Seoane v. Ortho Pharm., Inc., 660 F.2d 146, 149 (5th Cir. 1981) (requiring review by state malpractice tribunal prior to proceeding in federal court); Feinstein v. Mass. Gen. Hosp., 643 F.2d 880, 881–83 (1st Cir. 1981) (requiring review by state malpractice tribunal prior to proceeding in federal court); Hines v. Elkhart Gen. Hosp., 603 F.2d 646, 647 (7th Cir. 1979). *But see* Hum v. Dericks, 162 F.R.D. 628, 635 (D. Haw. 1995) (finding state requirement for submission to conciliation panel not outcome determinative and therefore procedural); Seck v. Hamrang, 657 F. Supp. 1074, 1076–77 (S.D.N.Y. 1987) (citing conflict with federal court's settlement power under FRCP 16 in holding that state rules do not apply).

[219] Carota v. Johns Manville Corp., 893 F.2d 448, 451 (1st Cir. 1990). *See generally* James B. Dolan Jr., *Crediting Payments by Concurring Tortfeasors: The Decline and Fall of the Jury Rule?*, 65 DEF. COUNS. J. 389 (1998) (examining whether the tort rule crediting defendants for payments by concurring tortfeasors should be administered by the court or jury).

[220] *Carota*, 893 F.2d at 451.

[221] *Id.* Massachusetts has since abandoned this evidentiary rule. *See* Morea v. Cosco, Inc., 664 N.E.2d 822, 824 (Mass. 1996). *See also* M. Robert Dushman, *Admission of Evidence of Plaintiff's Settlement with a Joint Tortfeasor: Supreme Judicial Court Finally Abandons the "Jury Rule,"* 41 BOSTON B.J., Jan./Feb. 1997, at 12.

rule or would classify the state's rule as a substantive policy and decide that it must prevail even in the face of FRE 408.

In sum, federal courts may well use the *Hanna* preemption analysis to decide that categorical state mediation exclusionary rules are preempted by FRE 408's more circumscribed evidentiary exclusion. In addition, if a state alternatively strengthens its version of FRE 408 to better protect mediation confidentiality, it risks the same result. Preemption by FRE 408 will, however, result in vertical discrepancies in confidentiality protection that will diminish predictability in mediation confidentiality. Furthermore, the possibility that a federal court might stress the substantive goals of mediation confidentiality by using the alternative "twilight zone" analysis only casts additional doubt on predicting the governing law.

4. *Mediated Settlement Agreements*

When attempts to enforce, interpret or declare a settlement agreement invalid implicate mediation communications, the law that governs settlement agreements may also establish the level of protection for confidentiality. When the issue is whether or not the parties reached an oral settlement, for example, applicable law that recognizes oral mediated agreements provides an invitation to probe the mediation process to determine whether the parties reached an agreement. In contrast, jurisdictions that require mediated settlement agreements to be written and signed as a prerequisite to court enforcement offer greater protection for confidentiality. Choice of law can be crucial here, because courts frequently permit oral agreements under the federal common law of settlement, but policy varies greatly under state law.[222]

The law that governs the settlement agreement can also set the degree of mediation confidentiality indirectly by determining the applicable law of privilege. For example, when the federal court in *Olam v. Congress Mortgage Co.* faced a motion to enforce an agreement reached in mediation, it characterized that motion, rather than the underlying substantive dispute, as the relevant claim for purposes of its privilege analysis.[223] The court asserted that settlements are contracts governed by state law and proceeded to analyze what law of privilege applies in federal court when state law provides the rules of decision for enforcing a settlement agreement.[224] However, the preliminary question—whether state or federal law governs a settlement

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[222] *See supra* Part III.B.5. *See generally* Deason, *supra* note 141.

[223] Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1119, 1124 (N.D. Cal. 1999).

[224] *Id.* at 1119–25.

agreement—is a far more complicated issue than the analysis in *Olam* suggests. Once again, the result is uncertainty.

In diversity cases, federal courts typically apply state law to govern the enforcement and interpretation of settlements, although they often do so without analysis.[225] This result advances the policy choices the state made through its contract law for settlements and is consistent with an *Erie* analysis that treats contract enforcement as a substantive matter for state law. This choice of law ignores, however, the substantive federal interests in settlement policy that are relevant when a federal court serves as the forum for the dispute and, perhaps also (as in *Olam*), as the host for the mediation. Moreover, even in this setting the distinction between substance and procedure is not always clear enough to avoid uncertainty. When the settlement provision takes the form of a state court rule requiring a written agreement, for example, courts may conclude that this requirement is procedural and thus does not apply in federal court.[226]

When the underlying settled claim instead arises under federal law, the federal courts' choice of settlement law is fraught with discrepancies. Rulings on the law applicable to settlements of federal question cases are contradictory, not only among the federal circuits, but also within circuits.[227] Some courts describe settlement as a contractual matter and tend to apply state contract law to the settlement agreement.[228] Those that instead

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[225] *See, e.g.*, Lefevre v. Keaty, 191 F.3d 596, 598 (5th Cir. 1999) (determining enforcement of settlement in diversity case under state law); Barry v. Barry, 172 F.3d 1011, 1013 (8th Cir. 1999) (construing settlement contract in diversity case according to state law).

[226] *See, e.g.*, Rheault v. Lufthansa German Airlines, 899 F. Supp. 325, 328 (E.D. Mich. 1995) (refusing to apply Michigan court rule that sets requirements for binding settlement agreements because rule is procedural, not substantive). The distinction between substance and procedure is also troublesome in the reverse setting with a state forum and settlement of a federal claim. *See, e.g.*, Royal Caribbean Corp. v. Modesto, 614 So. 2d 517, 519 (Fla. Dist. Ct. App. 1992) (applying state procedural and evidentiary law to settlement of Jones Act case governed by federal law).

[227] *See, e.g.*, Heuser v. Kephart, 215 F.3d 1186, 1190 n.4 (10th Cir. 2000) (noting general divergence of views on application of state or federal law to enforcement and interpretation of settlement agreements); Fleming v. United States Postal Serv., 27 F.3d 259, 260 (7th Cir. 1994) (citing contradictory Seventh Circuit cases applying federal and state law to settlement disputes in federal cases).

[228] *See, e.g.*, Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1253 (11th Cir. 1999) (adhering to general reliance on state law to determine enforcement of settlement agreement in employment discrimination case); Augustine Med., Inc. v. Progressive Dynamics, Inc., 194 F.3d 1367, 1370 (Fed. Cir. 1999) (interpreting release contained in settlement agreement according to state law); Jeff D. v. Andrus, 899 F.2d 753, 759–60 (9th Cir. 1990) (holding that construction and enforcement of settlement agreements are governed by local law on interpretation of contracts); Eastern Energy, Inc. v. Unico Oil &

emphasize the importance of the federal statutory right tend to lean toward federal common law.[229] Their analysis reflects the concern that courts "need to inquire beyond the state law requirements for a valid contract to fulfill the remedial policy of [the federal law] and prevent the involuntary or uninformed compromise of federal rights."[230] In those courts that select federal common law to govern settlement agreements, further variation is then generated by the choice between fashioning a uniform national federal common law and looking to state law for the content of federal common law.[231]

It is extremely hard to generalize or extract any principles from courts' decisions, perhaps because settlement appears to be a context prone to "true" conflicts, that is, those that cannot be avoided by deciding that only one

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Gas, Inc., 861 F.2d 1379, 1380 (5th Cir. 1988) (stating "construction and enforcement of settlement agreements is governed by principles of state law applicable to contracts generally" and applying state law to settlement of RICO claim (quoting Lee v. Hunt, 631 F.2d 1171, 1173–74 (5th Cir. 1980))).

[229] *See, e.g.*, Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359, 361 (1952) (holding releases of rights under the Federal Employers' Liability Act are governed by federal law); Malave v. Carney Hosp., 170 F.3d 217, 220 (1st Cir. 1999) (holding that motion to enforce settlement agreement is determined by federal law, at least when the underlying cause of action is federal); Williams v. Metzler, 132 F.3d 937, 946 (3d Cir. 1997) (holding that federal common law principles govern construction of settlement agreement involving a right to sue derived from a federal statute); Snider v. Circle K Corp. 923 F.2d 1404, 1407 (10th Cir. 1991) (holding that enforcement and interpretation of Title VII settlement agreements are governed by federal common law because these settlements are "inextricably linked" to the underlying law); Gamewell Mfg., Inc. v. HVAC Supply, Inc., 715 F.2d 112, 115–16 (4th Cir. 1983) (holding that federal law governs effect of settlement agreement in a case pending in federal court). *But see* Auer v. Kawasaki Motors Corp., 830 F.2d 535, 538 (4th Cir. 1987) (holding that state law governs effect of settlement agreements implicating third parties whose rights and duties derive from state law).

[230] Riley v. Am. Family Mut. Ins. Co., 881 F.2d 368, 374 (7th Cir. 1989).

[231] *Compare* United States *ex rel* Green v. Northrop Corp., 59 F.3d 953, 961 (9th Cir. 1995) (finding that formulation of a uniform federal common law rule to determine the validity of a release of a statutorily-conferred federal right was justified in *qui tam* case), *and* Locafrance U.S. Corp. v. Intermodal Sys. Leasing, Inc., 558 F.2d 1113, 1115 (2d Cir. 1977) (creating a federal rule to govern the effect of a release by a joint tortfeasor or coconspirator in a securities case), *with* Thede v. Norfolk S. Corp., 953 F.2d 1392 (table decision), No. 91-1079, 1992 WL 14943 (10th Cir. 1992) (looking to state law for guidance on federal common law when no established federal standards exist), Lumpkin v. Envirodyne Indus., Inc., 933 F.2d 449, 457–58 (7th Cir. 1991) (looking to state law as source of federal common law on releases when no general federal common law existed), *and* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458–60 (9th Cir. 1986) (finding that state law should provide the content of federal common law on the validity of releases of claims for cost-recovery under CERCLA).

jurisdiction has an interest is seeing its law applied. The state has relevant policies for the general process by which parties reach an agreement in its contract law, but federal policies for surrendering the substantive federal claim may be equally germane. In addition, when a settlement has been reached through mediation, the policy choice embodied in the law applicable to a subsequent dispute may affect the mediation host or the initial forum, as well as the forum for the subsequent dispute. If so, these jurisdictions also have interests in having their laws applied.

With so many legitimate sources for settlement law to govern mediations, it is not surprising that courts disagree on the appropriate choice. Unfortunately, the lack of a coherent theory for this choice-of-law decision means that seemingly arbitrary differences between cases can lead to contrary outcomes. For example, Ninth Circuit courts cite two separate lines of cases without cross-reference, seeming to draw a distinction between the construction and enforcement of agreements to settle federal claims—to which they apply state law—and the validity of releases of federal causes of action—to which they apply federal law.[232]

The analysis is, if possible, even less cogent when federal courts must consider settlements of pendent state claims along with federal claims. Then the case is often treated as if it were a pure diversity case, with no discussion of the presence of the federal claim.[233] When they do acknowledge a federal claim, some courts assert that all the settled claims should be treated consistently, while others approach settlements on a claim-by-claim basis,

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[232] *Compare* United Commercial Ins. Serv., Inc. v. Paymaster Corp., 962 F.2d 853, 856 (9th Cir. 1992) (stating construction and enforcement of settlement agreements are governed by principles of local law applicable to interpretation of contracts generally, even when federal statute is at issue), *and Andrus*, 899 F.2d at 759–60 (holding construction and enforcement of settlement agreements governed by local law on interpretation of contracts), *with Northrop*, 59 F.3d at 961 (applying federal common law to determine the validity of a release of a statutorily-conferred federal right in qui tam case), Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337, 1340 (9th Cir. 1992) (holding that federal law governed releases of federal securities law action), *and Mardan Corp.*, 804 F.2d at 1457 (holding that "federal law always governs the validity of releases of federal causes of action").

[233] *See, e.g.*, Carr v. Runyan, 89 F.3d 327, 331 (7th Cir. 1996) (enforcing mediation agreement of 42 U.S.C. § 1983 and diversity claims under state law without discussion of federal claim); Valley Ranch Dev. Co. v. FDIC, 960 F.2d 550, 553 (5th Cir. 1992) (applying state law to enforce settlement agreement as if the case were based on diversity jurisdiction); Ford v. Citizens & S. Nat'l Bank, 928 F.2d 1118, 1120 (11th Cir. 1991) (holding state law governs construction of settlement agreement in case alleging violations of federal consumer credit protection acts and state-law fraud).

contemplating that different rules may govern the settlements of federal and state claims contained in the same case.[234]

The confusion in determining the law applicable to settlement agreements becomes more important as states modify their traditional contract rules on oral agreements, either for settlements in general or mediations in particular. When they create special, more protective, rules for mediated settlements, they recognize values in confidentiality that were not previously factored into the policy balance. This then heightens the importance of which law, federal or state (and if state, which one), will be used to evaluate the enforceability of the settlement agreement.

5. *Interstate Issues*

A federal court's vertical choice of law is not the end of the matter for the parties if the court chooses the state law of mediation confidentiality. While not the focus of this Article, it is worth mentioning a few of the sources of unpredictability here. First, it is unresolved whether state or federal law principles will determine the choice of state privilege law in federal court.[235] Second, the standard for making that choice is not clear under either state or federal law.[236] Third, there is much uncertainty in the application of many of those standards. If privileges were treated as procedural, they could be associated predictably with the state forum, but the trend is to treat privileges as substantive.[237] And although the Restatement (Second) of Conflicts has been criticized as "forum-centered,"[238] it does open the window to non-forum privilege law. It can also be criticized as

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[234] *Compare* Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 759 & n.2 (D.S.C. 1999) (applying state contract law to enforcement of settlement agreement when state-law claims more numerous; adopting state law as federal common law to apply to settlement of federal Title VII and RICO claims because federal interests not impaired) *and* Tiernan v. Devoe, 923 F.2d 1024, 1032–33 (3d Cir. 1991) (citing need for consistent rule for settlement of both federal and state claims and opting for state law because no substantial federal interest would be affected), *with* U.S. Anchor Mfg., Inc. v. Rule Indus., Inc., 7 F.3d 986, 993 & n.11 (11th Cir. 1993) (certifying questions about settlement of state-law claims to state court; stating in dicta that releases of federal antitrust claims are governed by federal common law), *and Locafrance U.S. Corp.*, 558 F.2d at 1115–16 (holding federal law governs releases of federal statutory claims; contemplating use of state law on releases for pendent state claims if federal claim survives).

[235] *See generally* MUELLER & KIRKPATRICK, *supra* note 84, § 176.

[236] *Id.* § 176, at 274 ("Law is still in a state of flux, and there are simply not many decisions on the question [of] which state's privilege law applies.").

[237] *See* WEINTRAUB, *supra* note 28, § 3.2C3, at 77.

[238] *See id.* at 77–78; Rosenberg, *supra* note 58, at 168–71.

favoring admissibility in lieu of privilege, although again, its exceptions provide flexibility.[239]

Federal courts that choose state law when confidentiality issues come up in the context of settlement enforcement similarly face the unsettled question of which state law that should be—the law of the forum state, or the law indicated by the choice-of-law rules of the forum state.[240] States that have adopted the approach of the Restatement (Second) will honor the parties' choice of law or use the law of the state with the most significant relationship, another determination that can often cause uncertainty.[241]

D. *Summary*

When the multiple possibilities for choice-of-law doctrine are combined with the inherent difficulties in applying those doctrines, vertical choice of law for mediation confidentiality begins to look exceedingly complex. It is also apparent that in many circumstances this complexity extends beyond doctrine to the interests at stake in revealing or protecting mediation communications. Is predictability for mediation confidentiality possible in this system? The most promising approach for improving predictability is to make choice of law as irrelevant as possible. This can be done by developing more fully mechanisms used in other areas where behavior is shaped by legal expectations. These mechanisms include reliance on party agreements and uniformity in the law.

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[239] The Restatement endorses admissibility when the forum recognizes a privilege even though the state with the most significant relationship to the communication would admit the evidence, although it permits an exception when admission of the evidence "would be contrary to the strong public policy of the forum." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 139(1) (1971). It also endorses admissibility when the states' positions on confidentiality are reversed, choosing to apply forum law that permits admissibility rather than the privilege of the state with the most significant relationship, unless there is a "special reason" not to use forum law. *Id.* § 139(2).

[240] *Compare* Tucker v. Tucker, No. 99-35322, 1999 WL 1044911, at *1 (9th Cir. Nov. 15, 1999) (interpreting settlement agreement in diversity case using contract law of state in which federal court sits), *with* Larken v. Wray, 189 F.3d 729, 732–33 (8th Cir. 1999) (construing parties' settlement agreement in diversity case under state law determined by choice-of-law rules of forum state).

[241] *See, e.g.*, Asten, Inc. v. Wangner Sys. Corp., No. C.A. 15617, 1999 WL 803965, at *2 (Del. Ch. Sept. 23, 1999) (deciding that although the parties chose Delaware as their place of incorporation and Florida to mediate their federal patent dispute, South Carolina had the most significant relationship to the transaction as the site of the principal places of business of both parties and the location where the (alleged) agreement would be performed).

IV. POTENTIAL PATHS TOWARD MORE PREDICTABILITY

There are several ways in which confidentiality could be made more predictable for parties as they begin a mediation. Some entail the informal adoption of "best practices" by mediators and attorneys. Section A considers how mediators and mediation programs could alter the landscape by encouraging party agreements on mediation confidentiality or choice of law. Other means involve adopting legal rules that are more consistent among the courts and jurisdictions. Section B examines the extent to which federal courts could make mediation confidentiality more consistent by improving local rules for their mediation programs. Section C maintains that state law is a crucial element in the equation and that states could greatly improve predictability throughout the whole U.S. court system by adopting the Uniform Mediation Act. In the absence of uniformity, choice of law is an unavoidable problem, and section D considers how revising FRE 501 could improve predictability for the selection of privileges in federal courts. Finally, section E advocates legislating a federal mediation privilege.

A. *Party Control with Confidentiality Agreements*

Parties to a mediation, either private or court-sponsored, may decide to bypass the uncertainty of the choice-of-law rules or the weaknesses of the likely law of confidentiality. Although commentators have questioned the efficacy of using party agreements to protect confidentiality,[242] there is an important role for such agreements, and they are used frequently. In private mediations, parties commonly lay out the ground rules with an agreement to mediate, which ordinarily also includes an obligation to maintain the confidentiality of the process. An agreement on operating procedures may be beneficial even when a state statute protects confidentiality, for it can govern disclosures outside legal proceedings that may not be covered in the statute. Ideally, entering such an agreement can influence the parties' behavior by reinforcing the importance of confidentiality and obtaining the parties personal commitment to this principle. Such agreements to mediate are less common with court-sponsored mediation, however, perhaps because court rules and procedures usually make agreement on ground rules unnecessary.

One use of a confidentiality agreement is to relax the prohibitions of a statute and allow the parties to make agreed disclosures. Within the rubric of

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[242] *See, e.g.*, Kirtley, *supra* note 10, at 11 ("Contract theory offers little to those interested in broadly protecting mediation communications."); Brown, *supra* note 11, at 318 ("Agreements purporting to limit access to information disclosed in a mediation are of dubious effect at best.").

a privilege, this form of agreement is easily accommodated as a waiver.[243] Such agreements may be particularly helpful with a statute that prohibits extra-judicial disclosures to anyone other than mediation participants. The parties may agree instead on the need to consult with non-participants, such as a corporate board or the members of an organization that would be bound by the settlement, for approval of any agreement. Mediation with a public body subject to sunshine rules may also necessitate agreed deviations from a statutorily-mandated level of confidentiality, or the parties themselves may decide that this is a situation where the public interest is best served by compromising secrecy.[244]

There are limits, however, on the extent to which parties can ensure confidentiality by agreement. Strengthening the confidentiality provisions of the applicable statute or creating protection by agreement in the absence of a statute is questionable. First, unless a confidentiality agreement has been incorporated into a court order, it is not binding on non-parties to the agreement.[245] Parties may not "contract privately for the confidentiality of documents and foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position."[246] Second, if the agreement is viewed as an attempt to keep evidence from a public tribunal it may be void as against public policy.[247] The appropriate

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[243] Although many statutes proclaim broadly that mediation is "confidential," this may be thought of as a default rule that can be altered by an agreement of the parties. Many states implicitly acknowledge the possibility of altering strict confidentiality by agreement by including waiver provisions in their privilege statutes. Oregon is unusual in that its confidentiality provisions are explicitly designed as default rules. Subject to certain exceptions, mediation communications are declared confidential and may not be disclosed to "any other person." OR. REV. STAT. § 36.220(1)(a) (1999). But "[t]he parties to a mediation may agree in writing that all or part of the mediation communications are not confidential." *Id.* § 36.220(1)(b). The statute sets the opposite default rule for mediated agreements. Absent action by the parties the agreement may be disclosed, *id.* § 36.220(2)(a), but they may agree to keep all or part of its terms confidential, *id.* § 36.220(2)(b).

[244] *See* COLE ET AL., *supra* note 5, § 9:29. For differing views on mediation confidentiality for public policy disputes, see Will Pryor & Robert M. O'Boyle, *Public Policy ADR: Confidentiality in Conflict?*, 46 SMU L. REV. 2207 (1993) and Thomas S. Leatherbury & Mark A. Cover, *Keeping Public Mediation Public: Exploring the Conflict Between Confidential Mediation and Open Government*, 46 SMU L. REV. 2221 (1993).

[245] *See* COLE ET AL., *supra* note 5, § 9:24.

[246] Grumman Aerospace Corp. v. Titanium Metals Corp. of America, 91 F.R.D. 84, 87–88 (1981) (ordering party to confidentiality agreement to comply with discovery request filed by nonparty to the agreement).

[247] *See* COLE ET AL., *supra* note 5, § 9:24; MCCORMICK, *supra* note 14, § 184 (presumption of admissibility of relevant evidence); E. ALLAN FARNSWORTH, CONTRACTS §§ 5.1–5.2 (1982) (enforcement of contracts in violation of public policy

analysis here is a balancing act: the agreement will not be enforced if the harm it causes to public policy objectives exceeds the benefit of enforcement.[248] Accordingly, if mediation communications are at issue in a suit involving parties who did not participate in the mediation and so did not agree to confidentiality, a court will likely find that the agreement undermines the public need for discovery and access to full evidence, and thus would declare the confidentiality provision void.[249] Mediation parties may be able to increase the reach of their confidentiality agreement to third parties by incorporating it into a protective order entered by the court.[250] While this may improve their ability to resist disclosure in a later suit, it will not, however, guarantee predictability. Another court with a suit involving a stranger to the mediation may find that the need for the information outweighs the need to maintain confidentiality and may lift the protective order.[251] Against a third party, mediation participants need protection conferred by statute, common-law rule, or local court rule.

Courts seem far more willing, however, to enforce a confidentiality agreement between the parties to an agreement than against an outsider.[252]

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prohibited). *See also* Brazil, *supra* note 127, at 1026–27 (noting possibility that a court would refuse to enforce a confidentiality contract if it prevented the court from determining whether a settlement agreement should be enforced or whether the parties engaged in illegal conduct).

[248] *See* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) ("[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."). *Rumery* stated that this standard as a matter of federal common law is applicable to a decision to waive a constitutional right, but the court relied on principles of traditional contract law determined with reference to the Restatement of Contracts. *Id.* at 392 n.2. These principles are widely applicable and are incorporated in state law, *see, e.g.*, Livingstone v. North Belle Vernon Borough, 12 F.3d 1205, 1210 n.6 (3d Cir. 1993), and hence should govern agreements to mediate.

[249] *See, e.g.*, EEOC v. Astra USA, 94 F.3d 738, 745 (1st Cir. 1996) (holding that provisions in settlement agreements with employer that prevented employee from communicating with or assisting EEOC with litigation were unenforceable as against public policy); Hamad v. Graphic Arts Center, Inc., 72 Fair Empl. Prac. Cas. (BNA) 1759, 1760 (D. Or. 1997) (declaring confidentiality provision in settlement that prohibited settling employee from testifying at deposition void as against the public policy of encouraging broad discovery and prosecution of employment discrimination cases).

[250] FED. R. CIV. P. 26(c).

[251] *See, e.g.*, COLE ET AL., *supra* note 5, § 9:21; Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 18 (1983).

[252] *See, e.g.*, Tarrant Distrib. Inc. v. Heublein Inc., 127 F.3d 375, 379 (5th Cir. 1997) (enforcing confidentiality provision to prevent disclosure of materials submitted to a third party pursuant to a mediated agreement); Paranzino v. Barnett Bank of S. Fla., 690

Assuming the parties are competent, represented by counsel, and not hampered by significant differences in bargaining power,[253] enforcing a mediation confidentiality agreement is supported by the public policy in favor of voluntary settlement of claims,[254] and there is no counterweight from harm to a third party's litigation efforts. There may be other policies that weigh against maintaining confidentiality pursuant to a party agreement, but courts have not always found them controlling.[255] For example, following a mediation concerning allegations that a priest had fondled a minor, a Florida court required the child's parents to adhere to the confidentiality agreement they had signed before the mediation.[256] The agreement was enforced even though a dissenting judge argued that the confidentiality clause was void as against public policy given Florida's requirements to report suspected child abuse.[257]

When parties to a mediation agree they will not subpoena the mediator in any subsequent litigation, the arguments for enforcing this agreement are particularly strong. Their agreement is aligned with a public purpose. As described earlier, precluding mediator testimony is important to maintaining public confidence in the process.[258] The argument in favor of permitting the mediator to testify may also, however, have merit. The mediator's testimony may be the most reliable source of information available and its loss will often reduce the accuracy of the decisionmaking process. In this clash between encouraging effective settlement by mediation and favoring full evidence for court decisions, when the parties have a contract protecting the mediator from demands that he testify, courts have thus far required them to

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So. 2d 725, 729–30 (Fla. Dist. Ct. App. 1997) (sanctioning party for publicizing mediation communications when parties had entered agreement to maintain confidentiality and the mediation was governed by a state statute creating a mediation privilege).

[253] *See* Brazil, *supra* note 127, at 1027.

[254] *See, e.g.*, Dorn v. Astra USA, 975 F. Supp. 388, 392–93 (D. Mass. 1997) (citing public policy in favor of private dispute settlement in upholding validity between settling parties of agreements with confidentiality provisions).

[255] *See, e.g.*, Pierce v. St. Vrain Valley Sch. Dist., 981 P.2d 600, 604–07 (Colo. 1999) (holding that public policy expressed in Open Records Act did not prevent enforcement of confidentiality provisions of settlement agreement between school district and superintendent regarding unadjudicated allegations of sexual harassment).

[256] C.R. v. E., 573 So. 2d 1088 (Fla. Dist. Ct. App. 1991) (upholding injunction against breach of mediation confidentiality agreement).

[257] *Id.* at 1089. *But see* Mary R. v. B. & R. Corp., 196 Cal. Rptr. 871, 876 (Cal. Dist. Ct. App. 1983) (refusing to enforce settlement agreement that prohibited alleged victim of child molestation from revealing information to state authorities).

[258] *See supra* Part II; text accompanying notes 18–21.

adhere to this contract.[259] Conversely, courts have refused to enforce agreements between parties for disclosures by the mediator, at least when a statute or court rule prohibits this testimony.[260]

One possible drawback of relying on an agreement to provide confidentiality is that damages for breach may be difficult to measure, and therefore, the agreement may not provide sufficient deterrence to prevent disclosures.[261] This objection, however, is only partially applicable. A confidentiality agreement may not be enough to stop some parties from sua sponte filing offending material with a court,[262] but such agreements are more likely to play a significant role when a court has the chance to consider the disclosure in advance, as with a motion to quash a mediator subpoena.

More widespread use of party confidentiality agreements would be one way to strengthen the predictability of mediation confidentiality, at least for disputes between the parties to a mediation. Many mediators and mediation programs already encourage these agreements. Confidentiality agreements could also enhance predictability for court-sponsored mediations; however, only a few courts have incorporated them into their programs. In the Sixth Circuit, mediators elicit a confidentiality agreement from the parties at the beginning of the mediation process. Parties are asked to agree that they will not disclose what anyone says during the mediation or follow-up discussions "to anyone on this Court or any other court that might ever deal with these matters."[263] In the Ninth Circuit, the Circuit Mediation Office has prepared a

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[259] *See, e.g.*, Simrin v. Simrin, 43 Cal. Rptr. 376, 378–79 (Cal. Dist. Ct. App. 1965) (holding, pursuant to confidentiality agreement between the parties, that marriage counselor could not be compelled to testify about communications made in mediation); *see also* Haghighi v. Russian-Am. Broad. Co., 945 F. Supp. 1233, 1235 n.2 (D. Minn. 1996) (noting that in addition to a state-law prohibition on mediator testimony the parties' agreement to mediate also excluded mediator testimony), *rev'd on other grounds*, 173 F.3d 1086 (8th Cir. 1999).

[260] *See, e.g.*, Marchal v. Craig, 681 N.E.2d 1160, 1162–63 (Ind. Ct. App. 1997) (reversing decision in child custody dispute because trial court admitted and relied heavily on mediator's testimony pursuant to parties' stipulation that mediator was an acceptable witness).

[261] *See, e.g.*, Rosenberg, *supra* note 58, at 166.

[262] *Cf.* Bernard v. Galen Group, Inc., 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (affirming sanctions against an attorney who disclosed to a district court details of a mediation process in violation of the court's confidentiality provisions governing mediation).

[263] A memorandum originating from the office of the Circuit Mediators at the United States Court of Appeals for the Sixth Circuit discloses that Sixth Circuit mediators convey the following statement:

> I want to remind everyone that 6th Circuit Rule 33 makes these conversations confidential and off the record. More particularly, we would like to invite everyone

confidentiality agreement that the parties may sign as part of initiating mediation.[264] It limits the parties' use of mediation communications in court proceedings and their disclosures outside court proceedings.[265] Under the local mediation rule in the Eastern District of New York, parties are asked to sign a confidentiality agreement providing that mediation communications

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to agree that no one connected with these discussions will disclose anything that anyone says here today—or in any follow up communications that might flow from these—to anyone on this Court or any other court that might ever deal with these matters.

So, if there aren't any questions, can we all agree to this—that no one will disclose anything that anyone says to any court for any purpose?

Letter from Teresa R. Mack, Conference Administrator, U.S. Court of Appeals for the Sixth Circuit, to Robert J. Niemic (Dec. 5, 2000) (on file with the Ohio State Journal on Dispute Resolution).

[264] In addition, a document from the Circuit Mediation office at the United States Court of Appeals for the Ninth Circuit entitled "Procedures Governing the Circuit Mediation Program," states that the parties are assumed to agree to the Circuit's confidentiality provisions unless they indicate otherwise to the mediator at the initiation of settlement discussions. U.S. CT. APP. 9TH CIR. P. GOVERNING CIR. MEDIATION PROGRAM.

[265] The agreement reads as follows:

Consistent with the provisions of Ninth Circuit Rule 33-1 governing the confidentiality of mediation sessions, the participants in the mediation session agree to the following:

(1) No written or oral communication made by the mediator or any party, attorney, or other participant in the settlement discussions:

(a) may be used for any purpose in any pending or future proceeding in this or any other court or administrative forum; and

(b) may be disclosed to anyone who is not a participant in the mediation or an authorized agent of such participant.

(2) The nondisclosure provisions of paragraph (1) do not apply if such disclosure:

(a) is agreed upon by the mediator and all participants in the mediation or

(b) is made in the context of any subsequent confidential mediation or settlement conference with the agreement of all participants and the third party neutral.

(3) Evidence shall not be inadmissible or protected from disclosure solely by reason of its introduction or use in settlement discussions.

(4) The parties shall not subpoena the mediator or any documents submitted to or prepared by the mediator in connection with or during the mediation session and the mediator shall not testify on behalf of any party.

(5) Nothing in this agreement shall preclude the admissibility of a written settlement agreement reached as a result of settlement discussions conducted in whole or in part through the Circuit Mediation Program in an action to enforce such an agreement.

Confidentiality Agreement, Court of Appeals for the Ninth Circuit, Circuit Mediation Office (on file with the Ohio State Journal on Dispute Resolution).

may not be disclosed and that the parties will not call the mediator as a witness except in a court proceeding concerning the alleged misconduct of the mediator.[266]

While the scope of confidentiality agreements differ, they all serve some of the same purposes. First, they sensitize the parties to the issue of confidentiality and stimulate questions and discussion in situations where the parties anticipate the need for disclosure. Second, they express the parties' affirmative commitment to maintain confidentiality and may discourage defections from this principle. Finally, they provide independent authority for a court to require confidentiality in the event that other legal protections are unclear or inadequate.

Another way parties can use a confidentiality agreement to increase predictability is by designating the law that will govern any confidentiality dispute that arises between them. This is probably already commonplace in private mediation agreements but could also be useful in court programs. By choosing the law of a jurisdiction with strong protections against mediation disclosures, the parties can maximize the chances of maintaining the confidentiality of their mediation communications, subject only to the normal choice-of-law rules for designating applicable law.[267] Those rules might, however, prevent parties from designating the law of a jurisdiction that permits mediator testimony if the mediation would otherwise be governed by rules that prohibit such testimony.[268] I could find no cases exploring the limits on parties' choice of mediation law, although some federal courts have

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[266] The local district court rule provides in pertinent part,

> (d) Confidentiality.
>
> (1) The parties will be asked to sign an agreement of confidentiality at the beginning of the first mediation session to the following effect:
>
> (A) Unless the parties otherwise agree, all written and oral communications made by the parties and the mediator in connection with or during any mediation session are confidential and may not be disclosed or used for any purpose unrelated to the mediation.
>
> (B) The mediator shall not be called by any party as a witness in any court proceeding related to the subject matter of the mediation unless related to the alleged misconduct of the mediator.

E.D.N.Y. L. CIV. R. 83.11.

[267] Under the RESTATEMENT (SECOND) OF CONFLICT OF LAWS, parties to an agreement may designate the law of a particular jurisdiction to govern any issue, if the issue is one they could have determined directly in their agreement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(1) (1971). Even if the issue is one they could not have determined directly in their agreement, the parties' choice will be accepted unless they selected a jurisdiction with no link to the agreement or the law of that jurisdiction contravenes a "fundamental policy" of the jurisdiction whose law would apply absent the parties' designation. *Id.* § 187(2).

[268] *See supra* text accompanying note 34.

limited parties' choice of law regarding the validity of releases of federal causes of action.[269]

Parties may also be able to use choice of law in their mediation agreement to obtain the benefits of a court's mediation rules when they would not normally apply. For example, the Indiana Rules for Alternative Dispute Resolution do not govern mediations conducted before a suit is filed; however, when parties specified in their written mediation agreement that confidentiality would be maintained in conformity with these rules, an Indiana court used the rules to decide the parties' confidentiality dispute.[270]

B. *Harmonization of Federal Court Rules*

One avenue toward more consistency in confidentiality for federal court mediation programs is through coordination of the local court rules governing those programs. Currently, the variability and lack of clarity in many local rules exacerbate the uncertainty in predicting confidentiality protection. Revising the wording of many local rules could greatly improve the protection for mediation communications when those communications become relevant in later court proceedings.

Because of their history, local district court ADR rules are among the most variable local federal court rules. In the wake of the Civil Justice Reform Act of 1990 (CJRA), district courts adopted individualized ADR programs, along with discovery changes and case management innovations, to attack the problems of cost and delay.[271] Although these innovations were not the first departure from the ideal of a single, uniform procedural system that animated the adoption of the Federal Rules of Civil Procedure, the CJRA plans, including local mediation rules, represented a new degree of variation in federal rules.[272] Most of the local ADR rules were not inconsistent with

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[269] *See, e.g.*, Petro-Ventures, Inc. v. Takessian, 967 F.2d 1337, 1340 (9th Cir. 1992) (holding that federal law governed releases in spite of the parties' agreement that state law would govern their settlement).

[270] Vernon v. Acton, 732 N.E.2d 805, 808 & n.5 (Ind. 2000).

[271] 28 U.S.C. §§ 471–482 (1994).

[272] On the importance of uniformity in the Federal Rules of Civil Procedure, *see* Stephen B. Burbank, *The Rules Enabling Act of 1934,* 130 U. PA. L. REV. 1015, 1042–98 (1982). Even prior to the CJRA, local rules had introduced inconsistencies with the Federal Rules of Civil Procedure. *See* Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns,* 137 U. PA. L. REV. 1999, 2000–01 (1989). Scholars disagree on the extent to which the CJRA was intended to foster local rulemaking at the expense of national consistency. *Compare* Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990,* 46 STAN. L. REV. 1447 (1994), *with* Linda S. Mullenix, *The Counter-Reformation in Procedural*

the federal rules,[273] but they certainly differed from each other.[274] Congressional tolerance of divergence in federal court ADR rules then continued with the Alternative Dispute Resolution Act of 1998.[275] The Act promotes uniformity, in that it requires district courts to offer an ADR program and parties to consider using it, but it leaves to each district many choices on ADR offerings and implementation, including confidentiality.

As one can imagine given this independent development of mediation programs, the confidentiality rules vary greatly among the federal districts.[276] In addition, mediation programs in the courts of appeals, which are conducted under the authority of Rule 33 of the Federal Rules of Appellate Procedure, were developed circuit by circuit and similarly vary significantly in their confidentiality provisions.[277]

In addition to these variations in content, the ambiguity of many rules contributes to uncertainty. They frequently do not specify any legal means to protect confidentiality, and hence, like the state statutes with this flaw, these rules are not clear on the scope of confidentiality they authorize.[278] For example, many rules are concerned with the relationship of the judiciary to mediation, but while they often prohibit "disclosures to the court," or use similar language, they frequently remain silent and ambiguous on disclosures in future cases or to other courts.[279] Some rules suffer from the same shortcoming as the Alternative Dispute Resolution Act of 1998, in that they merely state that communications shall remain "confidential" without further

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Justice, 77 MINN. L. REV. 375 (1992), *and* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers,* 77 MINN. L. REV. 1284 (1993).

[273] *But see* Robel, *supra* note 272, at 1454 (describing CJRA Plans that required mandatory referral to ADR).

[274] *See generally* PLAPINGER & STIENSTRA, *supra* note 2 (providing a comprehensive overview of dispute resolution approaches used in each district and an analysis of their rules).

[275] 5 U.S.C. § 574 (Supp. 1998).

[276] *See generally* Gregory A. Litt, Note, *No Confidence: The Problem of Confidentiality by Local Rule in the ADR Act of 1998,* 78 TEX. L. REV. 1015 (2000) (providing overview of federal courts' treatment of mediation confidentiality).

[277] *See generally* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS (1997) (providing thorough description of mediation and conference programs in the federal courts of appeals).

[278] *See supra* text accompanying note 135.

[279] *See, e.g.,* N.D. ALA., U.S.D.C.R. app. I, at IV(B)(10); L.R. U.S.D.C. NEB. 53.2(d)(4).

details on the precise mechanism for maintaining that confidentiality.[280] In fact, sometimes it is not clear whether a local rule protects mediation communications only in court actions, only in extra judicial settings, or in both.[281] With these common flaws, simply clarifying their scope would improve many rules. If, in addition, local rules were made consistent with the Uniform Mediation Act, this would be an important step in promoting general uniformity.[282]

Unfortunately, there is no institutional mechanism for local rules to develop consistently. But a bigger drawback to relying on local federal court rules to achieve consistency is that their control over confidentiality disputes is itself uncertain. First, the rules that govern federal court programs do not apply to all mediations or in all forums. They ordinarily do not directly affect the confidentiality of private mediations or state court-sponsored mediations.[283] The reach of local federal confidentiality rules is also limited—even for federal court-sponsored mediations—when confidentiality issues subsequently arise in a state forum. While state courts and agencies have recognized that they could apply the federal rule as a matter of comity, to date they have not seemed to regard this as an obligation.[284]

Second, and most significantly, there are systemic reasons to doubt the power of federal courts to regulate mediation confidentiality in their mediation programs through local rules. To be sure, federal courts have

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[280] *See, e.g.*, Datapoint Corp. v. Picturetel Corp., No. Civ.A.3:93-CV-2381D, 1998 WL 25536 (N.D. Tex. Jan. 14, 1998) (finding no privilege in S.D. Tex. R. 20(I), although it makes mediations confidential and protects them from disclosure).

[281] *See* NIEMIC ET AL., *supra* note 7, at 94 (discussing lack of clarity in the term "confidentiality").

[282] Some federal courts currently promote uniformity within their state by incorporating state mediation rules into their local rules. W.D.N.C. L. R. 16.3(B)(1) (incorporating by reference mediation rules of North Carolina Supreme Court). *See, e.g.*, Doe v. Nebraska, 971 F. Supp. 1305, 1307 (D. Neb. 1997) (describing adoption of state law to govern mediation program in Nebraska federal courts).

[283] Private parties would, however, have the option to adopt court rules by agreement within the limits of the choice-of-law rules. *See, e.g.*, Vernon v. Acton, 732 N.E.2d 805, 808 & n.5 (Ind. 2000) (discussing adoption of court rules by parties to private mediation).

[284] A recent unreported Massachusetts case provides an example: the court determined that the First Circuit mediation rules did not preempt state law and applied the state freedom of information act to compel disclosures about a federal mediation conducted in an appellate court mediation program. Republican Co. v. Albano, No. 99-312 (Hampden County Sup. Ct. Apr. 2, 1999). *See also* Ford Motor Credit v. Shockley, Reid & Tyson, No. 93-1037-CV-W-6, 1996 WL 9689 (W.D. Mo. Jan. 4, 1996) (concluding that local federal court mediation rule would not prevent disclosure in state bar disciplinary proceedings except as a matter of comity).

applied local rules to prevent, permit, or condemn disclosures of communications from mediations conducted through federal court programs.[285] Yet when the question before a federal court is whether mediation communications are privileged, FRE 501 does not seem to contemplate local court rules as a source of law. Under the rule's two-pronged structure, a federal court must either use the state law of privilege or the federal common law of privilege unless required otherwise by the Constitution, an act of Congress, or a Supreme Court rule—a list that does not include local federal court rules.[286] If FRE 501's state-law proviso applies, local federal court rules are generally irrelevant.[287] When FRE 501 points instead to federal law, it specifies that federal common law must be developed by the courts on a case-by-case basis. This designation of the common law process would seem to preclude relying on a local rule, without more, to establish a mediation privilege. In fact, a number of courts have recently concluded that their local rules do not govern mediation confidentiality when a privilege would be necessary to control disclosures.[288]

In spite of these reasons to doubt that federal court rules will directly control all confidentiality disputes, clarifying and harmonizing local rules would be beneficial. Similarity among federal court rules would help solidify consistent norms and expectations for the mediation process. In practical terms, this could be one of the most effective ways to prevent confidentiality disputes from arising at all.

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[285] *See, e.g.*, Willis v. Trenton Memorial Assoc., 166 F.3d 337, No. 97-1123, 1998 WL 812110 (4th Cir. Sept. 22, 1998) (unpublished table decision) (finding reversible error in the district court's violation of its own local rule by ordering report from mediators); Clark v. Stapleton Corp., 957 F.2d 745, 746 (10th Cir. 1992) (admonishing counsel for disclosing statements made during mediation to the court in violation of 10th Cir. R. 33.1); Barnett v. Sea Land Serv., Inc., 875 F.2d 741, 743–44 (9th Cir. 1989) (affirming exclusion of mediation communications pursuant to district court local rule); Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928 (2d Cir. 1979) (condemning party's communication of mediator's comments to the court contrary to its notice of rules); Doe v. Nebraska, 971 F. Supp. 1305 (D. Neb. 1997) (interpreting the district's mediation plan to permit disclosure of the limits of representative's settlement authority on motion for sanctions); Bernard v. Galen Group, Inc., 901 F. Supp. 778, 784 (S.D.N.Y. 1995) (fining attorney for disclosing settlement offers in violation of court guidelines for mediation and referral order).

[286] *See supra* note 156.

[287] The one exception is when federal court rules incorporate the state law of confidentiality.

[288] *See, e.g.*, FDIC v. White, 76 F. Supp. 2d 736, 737–38 (N.D. Tex. 1999); Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1130 (N.D. Cal. 1999); Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1176 (C.D. Cal. 1998), *aff'd mem.*, 216 F.3d 1082 (9th Cir. 2000).

Moreover, local rules provide an opportunity for federal courts to influence the development of the federal common law of mediation confidentiality. A federal court considering a common law privilege is instructed to evaluate, among other factors, the need for confidentiality and the public purpose that would be served by a privilege.[289] Local court rules are indicative of these needs and purposes.[290] Moreover, local court rules are a logical source for a court adopting confidentiality protection as a matter of federal common law. By incorporating local rules into federal common law, courts have given these rules a central role in defining emerging standards for mediation confidentiality.[291]

In sum, approaching the problem through local federal court confidentiality rules can admittedly yield only a partial solution. Yet in spite of the limitations on the effectiveness and potential of local rules in the current privilege framework, if they harmonized their mediation rules federal courts could provide a model for parties' behavior and for courts that decide to adopt a federal common-law mediation privilege.

C. *State Enactment of the Uniform Mediation Act*

Perhaps ironically, the states could make a huge contribution to parties' ability to predict confidentiality in federal court by adopting a uniform approach themselves.[292] First, state uniformity is necessary if there is to be any chance of benefiting from vertical uniformity between state and federal mediation confidentiality provisions while simultaneously achieving horizontal uniformity among the federal courts. Thus, the more uniform the states' treatment of mediation, the more likely their treatment will enhance overall predictability in the judicial system.

Second, if the states present a united front by adopting the Uniform Mediation Act, this will influence the adoption of federal common law privileges in the federal courts. Under the Supreme Court's privilege analysis, "the existence of a consensus among the States indicates that

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[289] This evaluation is part of the analysis set forth by the Supreme Court for considering whether an exception from the general rule disfavoring testimonial privileges is justified. *See* Jaffe v. Redmond, 518 U.S. 1, 9 (1996); Trammel v. United States, 445 U.S. 40, 50 (1980).

[290] *Folb*, 16 F. Supp. 2d at 1175.

[291] *See* Sheldone v. Pa. Turnpike Comm'n, 104 F. Supp. 2d 511, 517 (W.D. Pa. 2000) (drawing directly on court's local rules to provide content for federal common-law mediation privilege).

[292] *See generally* Deason, *supra* note 11, at 103–04.

'reason and experience' support recognition of the privilege."[293] Thus, the states would provide a federal court considering the appropriate federal common law with powerful evidence of the need for mediation confidentiality.

Third, when a single state adopts a privilege, as contained in the Uniform Mediation Act,[294] that choice has an immediate and direct effect on confidentiality in federal court proceedings. A state-law privilege triggers the application of FRE 501 to determine the applicable law of privilege in federal court and, for diversity cases (roughly speaking), FRE 501 mandates state law. The more widespread the adoption of the Uniform Mediation Act, the less variation parties would see both in the federal courts' confidentiality analyses and in the law adopted under the state-law proviso of FRE 501. With extensive adoption of the Uniform Mediation Act, the level of confidentiality protection would be predictable for state-law cases brought in either federal or state court. The uncertainty that would remain would affect federal-law claims and state-law claims coupled with federal claims in federal court.

Does this mean that Congress, the federal courts, and their rulemaking committees should sit back and wait for the states to act? Even if the Uniform Mediation Act would provide a complete solution (which it would not), such reliance would be risky. The states do not have an especially exemplary record of adopting uniform laws. NCCUSL achieved its goal of uniformity with the Uniform Commercial Code, which has enjoyed widespread adoption and periodic revision, but other uniform acts have met less success. Many have garnered only token support.[295]

The Uniform Mediation Act was considered and approved by NCCUSL in August 2001. It is scheduled for consideration by the ABA in 2002. The joint drafting process that involved both NCCUSL and the ABA should enhance its prospects for wide enactment, but drafts of the Act have proved controversial with some observer groups. And state legislative processes are, of course, unpredictable.

D. *Revision of the Federal Privilege Rule*

Absent uniformity between state and federal laws on mediation confidentiality, making protection and disclosure more predictable in federal

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[293] *Jaffee*, 518 U.S. at 13 (adopting a psychotherapist privilege as a matter of federal common law).

[294] UNIF. MEDIATION ACT §§ 4–6 (2001).

[295] *See* James J. Brudney, *Mediation and Some Lessons From the Uniform State Law Experience*, 13 OHIO ST. J. ON DISP. RESOL. 795, 810–11 (1998).

court would require changing FRE 501, the rule that points federal courts to the applicable law of privilege. Some reforms could be made at the margins, such as clarifying the appropriate approach for designating the applicable privilege when a case involves both state and federal rules of decision. This would, by itself, remove much confusion.[296] Such reforms could improve predictability in the choice of law in a mechanical way, but they would not address the underlying difficulties with using FRE 501 in the context of mediation.[297]

Moreover, given the current extreme variability in the state law of mediation confidentiality, standardizing choice of law through reforms to FRE 501 at the present time would do little to further predictability one way or the other in the short term. Matters would improve greatly if the states embrace the Uniform Mediation Act widely. Then a rule that would lead federal courts to state law of privilege more often would also improve parties' ability to predict mediation confidentiality. If the states fail to rally behind the Uniform Mediation Act, however, a revision that increases federal courts' reliance on state privilege law would have the opposite effect and merely contribute to uncertainty in confidentiality.

Realistically, an overhaul of FRE 501 is unlikely unless it is needed in the broader context of privilege. A more modest goal would concentrate instead on resolving the inconsistency between the Alternative Dispute Resolution Act of 1998 and FRE 501. While the Act directs district courts to adopt local rules providing confidentiality for their ADR programs, strictly read, FRE 501 currently ignores local court rules.[298] This has the practical effect of undermining many local rules' confidentiality schemes; for unless there are federal and state privileges at least as strong as the protection contemplated in a local district court rule, the actual protection for confidentiality may fall short of the court's promise. From the point of view of parties caught unaware by inconsistencies between a court rule and the operative state or federal privilege, courts could be accused of simultaneously sponsoring mediation and encouraging parties to use it, yet failing to protect the confidentiality of the process adequately.

One resolution for the discrepancy between the Alternative Dispute Resolution Act and FRE 501 would be to add authority to FRE 501 for federal district courts to use their local rules to adopt privileges. This power is arguably justified in the context of mediation because of the congressional

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[296] *See supra* text accompanying notes 176–96 (describing the split between jurisdictions that take a claim-by-claim approach to the applicable privilege and those that prescribe the federal privilege when a plaintiff joins federal and state claims).

[297] *See supra* Part III.C.1.

[298] *See supra* note 156 and text accompanying notes 285–88.

mandate to adopt a confidentiality rule. Moreover, power to create a local mediation privilege would be directly related to programmatic concerns in the federal courts: parties in mediation conducted under court auspices need to know that their confidentiality will be protected effectively.

In the long run an approach centered on FRE 501 would probably prove ineffective in improving predictability. While a local privilege recognized as federal law by FRE 501 would give federal districts more control over confidentiality for their own mediation programs, the process for enacting local rules is not designed to create consistency among the programs.[299] Moreover, authority under FRE 501 to create local privileges could easily prove unwise if applied beyond the mediation context. Unless local rules would be a rational part of a broader solution to problems stemming from FRE 501, which seems unlikely, then this is probably not a fruitful approach. An amendment to the Alternative Dispute Resolution Act specifying that local rules govern all confidentiality disputes arising out of federal court mediation programs would be a more tailored solution. Such an amendment could also ensure that state courts will apply the rules the parties used to mediate by preempting state confidentiality rules when the mediation was conducted in a federal court program.

E. *Enactment of a Federal Mediation Privilege*

A federal mediation privilege enacted by Congress or delineated by the Supreme Court would be a more effective way to increase predictability in federal court then a revision of FRE 501. In fact, the Alternative Dispute Resolution Act contemplates that the local confidentiality rules it requires will be a temporary measure, in force only until a national rule is adopted through the Rules Enabling Act process.[300] A single federal privilege superceding the local rules mandated by the Alternative Dispute Resolution Act would solve the problems of variability in district court rules. It would supplement confidentiality agreements by controlling third-party attempts to obtain disclosures of mediation communications. If enacted or adopted through the rules process, such a privilege would immediately improve certainty, as compared to the slow, partial articulation of a privilege through the common-law process.[301] It could be drafted to avoid the discrepancies that have already begun to develop between state-law privileges and the

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[299] *See* Litt, *supra* note 276, at 1032.

[300] *See* 28 U.S.C. § 652(d) (Supp. V 1999).

[301] Both *Folb* and *Sheldone* defined only some of the necessary elements of a mediation privilege. *See supra* text accompanying notes 96–102.

federal common law due to uncertainties about the relationship of a privilege to FRE 408.[302]

Unfortunately, like the other possibilities discussed above, a federal mediation privilege offers only a partial solution to the need for predictable confidentiality. Without changes in FRE 501, the privilege would not control confidentiality when state law provides the rule of decision. Therefore, as long as some states fail to provide equivalent confidentiality protection, variation in federal court would remain. Moreover, federal courts would still lack complete control over their court-sponsored mediation programs because the federal mediation privilege would not always govern the confidentiality disputes that arise out of those programs. Nonetheless, a federal mediation privilege would be a key step toward improving predictability significantly, especially if it is designed to foster uniformity.

First, a federal mediation privilege (whether enacted or developed through the common-law process) should be consistent with the state privilege in the Uniform Mediation Act. Then if the states adopt that Act, vertical and horizontal uniformity would transcend the problems of predictability and choice of law. The drawback to this solution, of course, is that it is not completely within the power of the federal government, because it depends on the states to enact the Uniform Mediation Act.

Second, Congress should specify that the federal evidentiary privilege for mediation communications applies as an administrative measure to federal court mediation programs. Then a single privilege would govern all confidentiality disputes in cases mediated as part of a federal court program, and, in addition, under FRE 501 it would govern in disputes with a federal rule of decision. This strategy would become particularly important if the states fail to embrace the Uniform Mediation Act and predictability cannot be achieved through uniformity of state and federal law.

A federal privilege similar to that of the Uniform Mediation Act that also applies to all cases in federal court-annexed mediation programs would govern a large proportion of the mediation confidentiality issues in federal court. Disputes would fall outside this framework only with a private or state court-annexed mediation *and* a state-law rule of decision from a state that has not enacted the Uniform Mediation Act. Such a privilege would go a long way toward reducing uncertainty in mediation confidentiality even though it would not cover all situations.

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[302] *See Folb*, 16 F. Supp. 2d at 1180.

V. CONCLUSION

Under current law, it is very difficult to predict with any accuracy the level of protection for mediation communications in a confidentiality dispute. Flexibility in forum selection and complexity in choice-of-law rules create uncertainty in the applicable law. When added to the vast diversity of confidentiality provisions, this uncertainty means that courts may compel unexpected disclosures that have the potential to undermine confidence in mediation.

Federal courts are in the peculiar and awkward position of offering mediation programs for parties with cases before them when they cannot necessarily guarantee the continued confidentiality of communications made during that mediation process. In subsequent proceedings, confidentiality may depend on state law, which provides comprehensive protection in only about half the states and is extremely variable even among those states. Alternatively, confidentiality may depend on federal common law, which is unarticulated in most jurisdictions.

No single approach will lead to predictability for mediation confidentiality, but some developments could improve the situation by maximizing uniformity. In combination, several changes could improve predictability markedly.

Mediation parties could enhance the predictability of confidentiality for disputes between them by increasing their use, even in court-sponsored mediations, of confidentiality agreements to substitute for weak law or to designate applicable law.

For parties without mediation agreements and for discovery and testimony beyond the reach of party agreements, uniformity in state law through enactment of the Uniform Mediation Act would vastly increase predictability in federal court. The content of state law is important, because it is often directly applicable in federal court, it determines what choice-of-law analysis a federal court will use, and it is significant in the recognition of federal common-law privileges.

Federal rules also need attention. A federal mediation privilege modeled on the Uniform Mediation Act would enhance both vertical and horizontal uniformity and thus overall predictability. It would also displace the currently inconsistent local federal court confidentiality rules. Moreover, Congress could reduce the uncertainty in confidentiality associated with federal court mediation programs by making clear that this privilege will govern subsequent disputes arising out of those mediations in any forum.